SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

NO. —

THE UNITED STATES, PETITIONER

vs.

PROVIDENT TRUST COMPANY, AS ADMINISTRATOR OF THE ESTATE OF GEORGE THEODORE ROBERTS, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
Record from Court of Claims	1	1
Petition	1	1
Exhibit A—Certificate as to appointment of administrator	6	3
General traverse	7	3
Argument and submission of case	7	3
Special findings of fact	8	4
Conclusion of law	9	5
Opinion of the court, Green, J	9	5
Order entering judgment	13	8
Clerk's certificate [omitted in printing]	15	9
Order allowing certiorari		10

1 IN THE COURT OF CLAIMS

No. L-53

PROVIDENT TRUST COMPANY, AS ADMINISTRATOR OF THE ESTATE OF George Theodore Roberts, deceased, Plaintiff

v.

UNITED STATES OF AMERICA, DEFENDANT

I. *Petition*

Filed February 25, 1930

To the Honorable the Chief Justice and the Judges of the Court of Claims:

The plaintiff in the above-entitled cause brings this petition and respectfully shows to this honorable court as follows:

1. The decedent, George Theodore Roberts, died on March
2 11, 1921, a resident of Philadelphia, in the county of Philadelphia, in the State of Pennsylvania, leaving a last will and testament naming the Provident Life and Trust Company of Philadelphia as executor. The said last will and testament was duly admitted to probate by the Orphans' Court for the City and County of Philadelphia, in the State of Pennsylvania, on March 16, 1921. Letters testamentary were granted on that day to the Provident Life and Trust Company. Later the said Provident Life and Trust Company was discharged as executor by the said orphans' court and letters of administration de bonis non cum testamento annexo were granted on March 15, 1923, by the said court to the Provident Trust Company of Philadelphia, the plaintiff herein. The said plaintiff is still acting as such administrator and the said letters are in full force and effect at the time of filing this suit. An authenticated copy of the record of the appointment of the plaintiff by the said orphans' court as such administrator is annexed hereto, and marked "Exhibit A."

2. The Provident Life and Trust Company, the then executor of the estate, in conformity with the Revenue Act of 1918, duly filed with the collector of internal revenue at Philadelphia, Pennsylvania, a Federal estate tax return for the said estate disclosing an estate tax liability of $5,353.70. This amount was paid by the plaintiff to the said collector on, to wit, March 11, 1922. Subsequently, the Commissioner imposed an additional estate tax of $20,701.89. This amount, together with interest thereon of $606.88, was paid under protest by the plaintiff herein to the said collector on, to wit, May 17, 1924.

3 3. The plaintiff, in or about the month of August, 1927, filed with the said collector a claim for the refund of $18,404.05, or such greater amount as was legally refundable, a portion of the

estate tax theretofore paid to the collector. The basis of said claim was that there should have been allowed as a deduction from the gross estate the amount of the residue of the estate passing under the will of the decedent to certain charitable corporations and trusts designated therein. The claim was rejected by the Commissioner on, to wit, March 2, 1928, and has never been reopened nor allowed.

4. The plaintiff's testator directed in "Item 8" of the aforesaid will that, upon the decease of his daughter, Elizabeth Wentworth Roberts, without leaving lawful issue her surviving, his entire residuary estate should be distributed, share and share alike, to and among fourteen designated corporations organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or/and to trustees exclusively for such religious, charitable, scientific, literary or educational purposes.

5. The said Elizabeth Wentworth Roberts was born June 10, 1871. On March 11, 1921, the date of the testator's death, she was unmarried, without issue and without possibility of issue. She died on March 12, 1927, unmarried and without issue. Thereupon, the entire residue was payable to the aforesaid corporations and/or trusts designated in the will.

6. These said fourteen bequests amounted in the aggregate to not less than $548,102.66.

7. Section 403 (a) of the Revenue Act of 1918 provides that

> there shall be deducted from the value of the gross estate, in determining the value of the net estate, the amount of all bequests, legacies, devises, or gifts, to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes.

8. The plaintiff avers that the Commissioner should have reduced the gross estate by the amount of $548,102.66, representing the aggregate of the aforesaid bequests; that the taxes paid as aforesaid were not, therefore, due and owing to the United States; and that the said Commissioner should have directed the repayment to the plaintiff from the Treasury of the United States of the amount of the said taxes, with interest.

9. The plaintiff and the testator have always borne true faith and allegiance to the Government of the United States and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government.

10. The plaintiff has not assigned its claim nor any part thereof but is the sole owner of this claim. The said plaintiff is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets. The plaintiff believes that the facts as stated in this petition are true.

Wherefore, the plaintiff prays this honorable court to enter judgment in the plaintiff's behalf against the United States of America in the amount of $24,939.33, together with interest at six per
5 centum on $3,630.56, a portion thereof, from March 11, 1922, and on $21,308.77, the remainder thereof, from May 17, 1924.

The plaintiff also prays this honorable court to enter judgment in the plaintiff's behalf for the costs and disbursements in this proceeding and for such other and further relief as may be proper.

GEORGE M. MORRIS,
Attorney for Plaintiff.

Of Counsel,
KIXMILLER, BAAR & MORRIS,
815 Fifteenth St. NW., Washington, D.C.

[*Duly sworn to by Howard A. Foster; jurat omitted in printing.*]

6 *Exhibit A to petition*

No. 62974

PHILADELPHIA CITY AND COUNTY, *ss:*

I, William F. Campbell, register for the probate of wills and granting letters of administration in and for the city and county of Philadelphia, in the Commonwealth of Pennsylvania. Do hereby certify and make known that on the 15 day of March, in the year of our Lord one thousand nine hundred and twenty-three letters of administration de bonis non cum testamento annexo on the Estate of George Theodore Roberts deceased were granted unto Provident Trust Co. of Phila. It having first given security well and truly to administer the same. And that no revocation of said letter appears of record in the office of the register of wills for said county.

Given under my hand and seal of office, this 14th day of June 1929

[SEAL] (Signed) JOHN I. KELLY,
Deputy Register.

7 II. *General traverse*

Filed April 5, 1930

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

CHARLES B. RUGG,
Assistant Attorney General.

III. *Argument and submission of case*

On January 9, 1933, this case was argued and submitted on merits by Messrs. Allen H. Gardner and George M. Morris, for the plaintiff, and by Mr. Fred K. Dyar, for the defendant.

8 IV. *Special findings of fact, conclusion of law, and opinion of the court by Green, J.*

Filed February 6, 1933

Messrs. Allen H. Gardner and George M. Morris for plaintiff. Messrs. Joseph Carson, Charles C. Perkins, and KixMiller, Baar & Morris were on the brief.

Mr. Fred K. Dyar, with whom was Mr. Assistant Attorney General Charles B. Rugg, for defendant.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special findings of fact

George Theodore Roberts, a resident of the State of Pennsylvania, died in 1921, leaving a will by which the Provident Life & Trust Company, plaintiff herein, was made executor. This will was duly probated on March 16, 1921, and the plaintiff herein became first executor and later administrator of the estate.

Plaintiff, as executor, filed a return for said estate and paid a tax of $5,353.70 on March 11, 1922. Subsequently the commissioner imposed an additional estate tax of $20,701.89, which amount, together with interest thereon of $606.88, was paid by the plaintiff on May 17, 1924.

Plaintiff, on August 4, 1927, filed a claim for the refund of $18,404.05, or such greater amount as was legally refundable out of the taxes paid, on the ground that under the provisions of the will of the decedent the value of the residuary estate, less the value of the life estate of one Elizabeth Wentworth Roberts, should be allowed as a deduction from the gross estate. This claim for refund was rejected.

The testator's will, among other things, after making certain bequests, devised the remainder of his estate to the plaintiff herein in trust to pay the income thereof to his daughter, Elizabeth Wentworth Roberts, during her natural life and upon her death unto her lawful issue, and further provided that upon the decease of the decedent's daughter without issue his residuary estate so devised in trust should be distributed among certain charitable institutions and societies. The parties have agreed in writing that these institutions and societies all are included in that class of organi-

9 zations, bequests to which are deductible from the gross estate of a decedent under the provisions of section 403 (a) (3) of the revenue act of 1918.

The testator left surviving him one child, Elizabeth Wentworth Roberts, born on June 10, 1871. At the time of her father's death she was fifty years of age. For several years previous to her father's death the daughter had been in poor health and most of the time

was under a physician's care. On February 7, 1914, at the direction of her attending physician she consulted a gynecologist, who made a pelvic examination and located a fibroid tumor of the uterus. It was considered an operable case and two days later, on February 9, 1914, the gynecologist performed an operation, removing the uterus with the tumor, the Fallopian tubes, and both ovaries. The operation and removal of the organs were necessary to prevent further impairment of her health. After the operation she could not have become pregnant nor could she have given birth to a child. She died on March 12, 1927, unmarried, and without ever having given birth to a child.

On November 30, 1927, the Orphans' Court of Philadelphia County, State of Pennsylvania, awarded the residue of the estate, subject to the payment of any transfer or inheritance taxes which might be due to the fourteen organizations named in the will as residuary legatees.

The Commissioner of Internal Revenue in his audit determined that the total gross estate of the plaintiff's testator amounted to $814,470.54, with allowable deductions which produced a net taxable estate of $659,259.83, upon which the Federal estate tax paid as aforesaid was based. Of the $814,470.54 determined as the value of the gross estate, $649,990.16 represented the value on March 11, 1921, the date of the testator's death, of the property falling in the residuary estate. Determined upon the basis of the life expectancy of the life tenant. Elizabeth Wentworth Roberts, with a discount factor for reducing the reversion to present worth, the value on March 11, 1921, of an amount of $649.990.16 payable to charitable institutions and societies as aforesaid at the death of the life tenant was $313.236.76.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover. Judgment will be withheld pending the submission by respective counsel of the calculation of the interest due the plaintiff on the amount which it is entitled to recover.

Opinion

GREEN, Judge, delivered the opinion of the court:

Plaintiff brings this suit to recover $24,939.33 with interest, being the amount overpaid as alleged in the petition upon taxes assessed against the estate of George Theodore Roberts, deceased, of which the plaintiff is administrator. The facts in the case are undisputed.

The deceased left a will, under which his daughter Elizabeth Wentworth Roberts was made residuary legatee, the bequest to her, however, being made in trust to the plaintiff to pay the net income to her during the term of her natural life and upon her

death to her lawful issue, or, in event she died without issue, to certain charitable institutions named in the will. It is sufficient without repeating the other matters shown in the findings to say that under the issues and facts in the case the counsel for the respective parties agree that there is but one question for the determination of the court, and that is whether evidence can be admitted to show that at the time of the decease of the testator his daughter was incapable of having issue, and if so whether the presumption to the contrary has been overcome. The defendant contends that the testimony offered by the plaintiff on this point should be excluded.

A large number of authorities have been called to the attention of the court by both parties, but in order to properly determine their application it will be necessary to consider the fundamental rules of evidence. Mr. Wigmore, in his monumental work on evidence, lays down the rule (vol. 1, sec. 10) that—

"All facts having rational probative value are admissible, unless some specific rule forbids."

In section 11 following he states that—

"* * * the rules of admissibility may be grouped under three heads, the first dealing with the probative value of specific facts, the second including artificial rules which do not profess to define probative value but yet aim at increasing or safeguarding it, and the third covering all those rules which rest on extrinsic policies irrespective of probative value."

The third group of rules, he says, "invokes, for the exclusion of certain kinds of facts, extrinsic policies which override the policy of ascertaining the truth by all available means." It is plain that if the evidence now under consideration is to be excluded, it must be done under this third group of rules, for we think there can be no question as to its having a probative value. The testimony which has been introduced establishes a state of facts from which, as we think, no reasonable person can draw but one conclusion. If it is excluded, it must be, as further stated by Mr. Wigmore, "because its admission would injure some other cause more than it would help the cause of truth, and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth." As Wigmore further shows, most of these rules excluding evidence consist in giving certain persons an option, i.e., "a privilege to withhold the evidential fact."

With these fundamental principles in mind, we proceed to an examination of the decisions cited on behalf of the defendant. In the greater number of the cases cited it would appear that evidence of the character which plaintiff asks to be received was held to be inadmissible for various reasons which are not applicable to the facts now under consideration, or at least not applicable to the issues joined herein. In most of the cases which hold that evidence of this nature should be rejected it was held that there was a presumption

that the person to whom such testimony or evidence referred was capable of having issue and in some of these cases this pre-
11 sumption was held to be a conclusive one, but this latter holding, as it seems to us, is not based on any good reason. At least no reason is given which would conform to the rule stated by Mr. Wigmore, as we shall show later on. In some cases it was said that such evidence ought not to be received when it affected the devolution of estates. Conceding for the sake of the argument that this is the correct rule, we think it has no application here, as the devolution of the estate must in any event be determined by the circumstances existing at the time of the death of the residuary legatee, and be proved by altogether different evidence. In one case the somewhat surprising statement was made that the delicacy of the matter prevented such evidence from being considered, but the courts are every day considering evidence which would much more be subject to this kind of an objection. In another case it was held that the consequences of admitting evidence of this character were too serious. As to this last point it may be said that the consequences of testimony being received are usually serious with reference to one party or the other, but they are most serious in criminal cases where the life of the defendant may be involved and where the ability of the Government to enforce its laws and protect its citizens is always affected.

The rules of extrinsic policy which may exclude evidence regardless of its probative force are either absolute or conditional. In the case at bar counsel for defendant claims that the rule is absolute. Again consulting Wigmore (section 2180), we find that the rules of absolute exclusion include matter that involves indecency, or impropriety (such as testimony given by a judge, counsel, or juror); inconvenience (public records), or illegality, which may in certain instances be determined by legislative action. It would seem to be clear that the testimony which is now offered does not come under the head of any of the matters referred to above.

What harm or injurious effect can result from receiving the testimony offered in this case? None has been called to our attention and we do not perceive any. In some of the cases cited the testimony was said to be doubtful, conjectural, or unsatisfactory in its nature, and when the particular testimony offered in those cases is considered it may be conceded that there was reason for its rejection. But the testimony offered in the case at bar is not of that nature. It is positive, direct and conclusive, of a nature that would satisfy ordinarily prudent men in acting upon it in matters of the highest importance, and we do not think it should be rejected.

The cases cited on behalf of defendant exceed in number those relied upon by plaintiff, but, as we have already shown, only those decisions cited by defendant which make the presumption conclusive are directly in point and these cases are few in number. Moreover, the courts are more and more turning away from old precedents which without good reason prevent the real facts from being shown.

To hold otherwise is to deny a litigant relief no matter what may be the merits of his case.

Having determined that the testimony under consideration is admissible, we have deduced therefrom the ultimate fact that at the time of the death of the testator his daughter was in-
12 capable of having issue. (See fifth paragraph of the findings.) From this finding it follows that the residue of the estate bequeathed to the decedent's daughter would pass at her death to the charities named in his will. The parties have stipulated in effect that in such event the value thereof at the time of the testator's death should have been deducted from the value of the gross estate in determining the amount of tax to be paid on the net amount subject to taxation. Determined on the basis of the life expectancy of the life tenant with a discount for reducing the reversion to present worth, the value of the interest passing to these charities at the death of the testator has been found to be $313,236.76. Using these figures the computation of the tax presents no difficulty, and it is merely a matter of subtraction from the amount of the tax paid to ascertain the sum to be refunded to plaintiff. But in addition to this the interest on the refund will be computed and this raises a controverted question under the law of 1932 which has not yet been definitely settled by the courts and upon which counsel have favored us with no argument nor even suggestion.

A conclusion of law will be entered holding that plaintiff is entitled to judgment, which will be withheld pending a submission by the respective parties of a calculation of the amount of refund, including interest, due the plaintiff in accordance with this opinion, together with such argument as they may see fit to submit with reference to the manner in which this interest should be computed. It is so ordered.

WHALEY, Judge; WILLIAMS, Judge; and LITTLETON, Judge, concur.

BOOTH, Chief Justice, took no part in the decision of this case on account of illness.

13 V. *Order entering judgment*

Filed April 10, 1933

This case comes before the court on stipulation of the parties for judgment; and it appearing that on February 6, 1933, the court filed special findings of fact with an opinion holding that the plaintiff is entitled to recover but suspending the entry of judgment pending a submission by the parties of a calculation of the amount of refund, including interest, due the plaintiff in accordance with the court's opinion; and it further appearing that on April 3, 1933, said stipulation by the parties was filed showing the amount of the tax overpaid to be $16,714.67 and the amount of interest overpaid to be $489.99, and the date from which interest is to be computed to be

May 17, 1924, now, therefore, it is ordered this 10th day of April, 1933, that judgment be and the same is entered in favor of plaintiff in said sums of $16,714.67 and $489.99, a total of seventeen thousand, two hundred and four dollars and sixty-six cents ($17,204.66), together with interest thereon at the rate of six percent per annum from May 17, 1924, to such date as the Commissioner of Internal Revenue may determine, in accordance with the provisions of section 177 (b) of the Judicial Code as amended by section 284, title 28, of the U.S. Code.

[Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1933

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 224.

Order allowing certiorari

Filed October 9, 1933

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statute and regulations involved	2
Statement	2
Specification of errors to be urged	4
Reasons for granting the writ	4
Appendix (statute and regulations)	8

CITATIONS

Cases:	
Ansonia Nat. Bank v. *Kunkel*, 105 Conn. 744	6
Azarch v. *Smith*, 222 Ky. 566	6
Bacot v. *Fessenden*, 130 App. Div. (N.Y.) 819	6
Bowen v. *Frank*, 179 Ark. 1004	6
Bowlin v. *Rhode Island Hospital Trust Co.* 31 R.I. 289	6
Dawson, In re, L.R. 39 Ch. Div. 155	6
Dougan, In re, 139 Ga. 351	6
DuPont v. *DuPont*, 159 Atl. 841 (Del. Ch. 1932)	6
Farrington v. *Commissioner of Internal Revenue*, 30 F. (2d) 915, certiorari denied, 279 U.S. 873	4, 5
Fletcher v. *Los Angeles Trust etc. Bank*, 182 Cal. 177	6
Flora v. *Anderson*, 67 Fed. 182, reaffirmed, 75 Fed. 217	5, 6
Gettins v. *Grand Rapids Trust Co.*, 249 Mich. 238	6
Gowen's Appeal, 106 Pa. 288	6
Guaranty Trust Co. v. *Commissioner of Internal Revenue*, decided January 31, 1933, 27 B.T.A.	5
Hill v. *Sangamon Loan & Trust Co.*, 295 Ill. 619	5, 6
Hocking, In re, [1898] 2 Ch. 567	6
Humes v. *United States*, 276 U.S. 487	4
Ithaca Trust Co. v. *United States*, 279 U.S. 151	4
List v. *Rodney*, 83 Pa. 483	6
Lovering v. *Lovering*, 129 Mass. 97	6
Male v. *Williams*, 48 N.J.Eq. 33	6
May v. *Bank of Hardinsburg & Trust Co.*, 150 Ky. 136	6
Mellon's Estate, 16 Phila. (Pa.) 323	6
Miller v. *Macomb*, 26 Wend. (N.Y.) 229	6
Moore's Exr. v. *Beauchamp*, 5 Dana (Ky) 70	6

Cases—Continued.	Page.
Ricard's Trust Estate, In re, 97 Md. 608	6
Riley v. *Riley*, 92 N.J. Eq. 465	6
Sterrett's Estate, 300 Pa. 116	6
Towle v. *Delano*, 144 Mass. 95	6
White, In re, [1901] 1 Ch. 570	7
Whitney v. *Groo*, 40 App.D.C. 496	6
Statutes:	
Revenue Act of 1918, c. 18, Sec. 403 (a) (3), 40 Stat. 1057, 1098–1099	8
Revenue Act of 1921, c. 136, Sec. 403 (a) (3), 42 Stat. 227, 279–280	7
Revenue Act of 1924, c. 234, Sec. 303 (a) (3), 43 Stat. 253, 305–306 (U.S.C., Title 26, Sec. 1095 (a) (3))	7
Revenue Act of 1926, c. 27, Sec. 303 (a) (3), 44 Stat. 9, 72 (U.S.C.App., Title 26, Sec. 1095 (a) (3); U.S.C. Sup. VI, Title 26, Sec. 412 (d))	7
Treasury Regulations:	
Regulations 37:	
Art. 53	8
Art. 56	9
Regulations 63, Arts. 47, 50	7
Regulations 68, Arts. 44, 47	7
Regulations 70, (1926 ed.), Arts. 44, 47	7
Regulations 70, (1929 ed.), Arts. 44, 47	7

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. —

THE UNITED STATES, PETITIONER,

v.

PROVIDENT TRUST COMPANY, AS ADMINISTRATOR OF the Estate of George Theodore Roberts, Deceased

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General on behalf of the United States prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case on April 10, 1933.

OPINION BELOW

The opinion of the Court of Claims is reported in 2 F. Supp. 472.

JURISDICTION

The judgment of the Court of Claims was entered April 10, 1933. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether medical testimony of the incapacity of a woman to bear children is admissible in order

to establish the right to deduct from the value of a testator's gross estate under Section 403 (a) (3) of the Revenue Act of 1918 the value of bequests made to charity limited upon the death of the testator's daughter without issue.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved appear in the Appendix, *infra*, pp. 8–9.

STATEMENT

The findings of fact of the Court of Claims (R. 4–5) may be summarized as follows:

George Theodore Roberts, a resident of the State of Pennsylvania, died testate in the year 1921. His will, after making certain bequests, devised the remainder of his estate to the respondent herein in trust to pay the income thereof to his daughter, Elizabeth Wentworth Roberts, during her natural life and upon her death to her lawful issue, and further provided that upon the decease of his daughter without issue the residuary estate so devised in trust should be distributed among certain charitable institutions and societies. The parties have agreed in writing that these institutions and societies are all included in that class of organizations bequests to which are deductible from the gross estate of a decedent under the provisions of Section 403 (a) (3) of the Revenue Act of 1918.

The testator left surviving him one child—Elizabeth Wentworth Roberts—who was born on June

10, 1871, and was 50 years of age at the time of her father's death. On February 9, 1914, she submitted to an operation upon the advice of a gynecologist, which resulted in the removal of the uterus, the Fallopian tubes, and both ovaries. After the operation she could not have become pregnant or given birth to a child. She died on March 12, 1927, unmarried, and without ever having given birth to a child.

On November 30, 1927, the Orphans' Court of Philadelphia County, Pennsylvania, awarded the residue of the estate subject to the payment of any transfer or inheritance taxes, to the organizations named in the will as residuary legatees.

The respondent was named the executor in the testator's will. The will was duly probated on March 16, 1921. Respondent later became administrator of the estate.

Respondent as executor filed a return for said estate and paid a tax of $5,353.70 on March 11, 1922. Later the Commissioner imposed an additional estate tax of $20,701.89, which was paid, with interest thereon, by the respondent on May 17, 1924.

Respondent on August 4, 1927, filed a claim for the refund of $18,404.05, or such greater amount as was legally refundable out of the taxes paid, on the ground that under the provisions of the will the value of the residuary estate less the value of the life estate should be allowed as a deduction from the gross estate. This claim for refund was rejected.

The estate tax must be determined as of the date of the testator's death. *Ithaca Trust Co.* v. *United States*, 279 U.S. 151, 155. Unless it was permissible to prove that the testator's daughter was incapable of having issue, the charitable bequests were dependent upon a condition unfulfilled on the date of the testator's death, and no deduction was allowable. Reg. 37, Art. 566, *infra*, p. 9; *Humes* v. *United States*, 276 U.S. 487.

The Court of Claims gave judgment for respondent in the sum of $17,204.66, with interest.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In receiving medical testimony of the incapacity of the testator's daughter to bear children.

2. In holding on the basis of evidence of the incapacity of the testator's daughter to bear children that a deduction was allowable from the value of the testator's gross estate under Section 403 (a) (3) of the Revenue Act of 1918 for bequests to charity limited upon the death of the testator's daughter without issue.

3. In giving judgment for the respondent.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Farrington* v. *Commissioner of Internal Revenue*, 30 F. (2d) 915, certiorari denied, 279 U.S. 873. The irrebuttable presumption that women are capable of childbearing so long as they live was there applied to defeat the

contention that bequests to charity could be proved deductible from a testator's gross estate under Section 403 (a) (3) of the Revenue Act of 1921, when the bequest was limited upon the life tenant's dying without issue. The Circuit Court of Appeals recognized that the presumption of childbearing capacity is a conclusive one. Under the decision of the Circuit Court of Appeals the presumption is a rule of evidence that renders testimony of the incapacity to bear children inadmissible for any purpose. See also *Flora* v. *Anderson,* 67 Fed. 182 (C.C.S.D.Ohio), reaffirmed, 75 Fed. 217 (C.C.S.D. Ohio). The case at bar cannot therefore be distinguished on the ground that the evidence presented here was more satisfactory proof of lack of capacity.[1]

The decision of the Farrington case, *supra,* has recently been followed in the Board of Tax Appeals when evidence of a surgical operation was offered to show the impossibility of issue in order to secure a deduction under Section 303 (a) (3) of the Revenue Act of 1926. *Guaranty Trust Co.* v. *Commissioner of Internal Revenue,* No. 45500, Board of Tax Appeals, decided January 31, 1933, 27 B.T.A. —.

2. The decision of the court below is contrary to the great weight of authority. *Hill* v. *Sangamon*

[1] In the *Farrington* case the life tenant was a woman of 52 years who, though having been married for over 29 years, had never borne a child, and medical testimony was offered to show the impossibility of issue in that her menopause had occurred approximately 6 years prior to testator's death. See 13 B.T.A. 277.

Loan & Trust Co., 295 Ill. 619; *Gettins* v. *Grand Rapids Trust Co.*, 249 Mich. 238; *Azarch* v. *Smith*, 222 Ky. 566; *Sterrett's Estate*, 300 Pa. 116; *May* v. *Bank of Hardinsburg & Trust Co.*, 150 Ky. 136; *Lovering* v. *Lovering*, 129 Mass. 97; *Towle* v. *Delano*, 144 Mass. 95; *List* v. *Rodney*, 83 Pa. 483; *In re Ricard's Trust Estate*, 97 Md. 608; *Bowlin* v. *Rhode Island Hospital Trust Co.*, 31 R.I. 289; *In re Dougan*, 139 Ga. 351; *Fletcher* v. *Los Angeles Trust etc. Bank*, 182 Cal. 177; *Riley* v. *Riley*, 92 N.J.Eq. 465; *Flora* v. *Anderson*, *supra*; *Bowen* v. *Frank*, 179 Ark. 1004; *In re Dawson*, L.R. 39 Ch. Div. 155; *In re Hocking* [1898] 2 Ch. 567.

The rule rests upon grounds of public policy and morals. *Hill* v. *Sangoman Loan & Trust Co.*, *supra*, p. 622.

There are a few American cases which have allowed the presumption of childbearing capacity to be rebutted in order to decree the distribution of legacies, or to terminate a trust, or to determine the marketable title of property. *Moore's Executor* v. *Beauchamp*, 5 Dana (Ky.) 70; *Whitney* v. *Groo*, 40 App. D.C. 496; *Gowen's Appeal*, 106 Pa. 288; *Male* v. *Williams*, 48 N.J.Eq. 33; *Mellon's Estate*, 16 Phila. (Pa.) 323; *Bacot* v. *Fessenden*, 130 App. Div. (N.Y.) 819, 823.[2]

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[2] Even in such cases a bond is frequently required to protect the interests of the unborn children. The results of these cases may be reached without deciding that the presumption may be rebutted. See *DuPont* v. *DuPont*, 159 Atl. 841 (Del. Ch. 1932); *Miller* v. *Macomb*, 26 Wend. (N.Y.) 229; cf. *Ansonia Nat. Bank* v. *Kunkel*, 105 Conn. 744.

A number of English cases have allowed the presumption to be rebutted when no interest other than that of the unborn children is adversely affected. *In re White* [1901], 1 Ch. 570, and cases therein cited.

3. The question involved is one of present importance in Federal estate-tax law, and the elimination of the conflict of authority is required for orderly administration of the Federal estate tax. The provision of the 1918 Act here involved has been reenacted without material change in the Revenue Acts of 1921, 1924, and 1926, and the Regulations pursuant thereto have remained in substance the same. Revenue Act of 1921, c. 136, Sec. 403 (a) (3), 42 Stat. 227, 279–280, Reg. 63, Arts. 47, 50; Revenue Act of 1924, c. 234, Sec. 303 (a) (3), 43 Stat. 253, 305–306 (U.S.C., Title 26, Sec. 1095 (a) (3)), Reg. 68, Arts. 44, 47; Revenue Act of 1926, c. 27, Sec. 303 (a) (3), 44 Stat. 9, 72 (U.S.C.App., Title 26, Sec. 1095 (a) (3)), Reg. 70 (1926 ed.) Arts. 44, 47. The provision of Section 303 (a) (3) of the 1926 Act material here is still in effect. U.S.C. Sup. VI, Title 26, Sec. 412 (d); Reg. 70 (1929 ed.), Arts. 44, 47.

Wherefore, it is respectfully submitted that the petition should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

JUNE 1933.

APPENDIX

Section 403 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1098–1099, provides in part as follows:

> That for the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> * * * * *
>
> (3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. * * *

Treasury Regulations 37 provide in part as follows:

> ART. 53. *Public, charitable, and similar bequests.*—Bequests to religious, charitable, scientific, literary, or educational corporations are deductible only if the corporation is organized or operated exclusively for one of the purposes specified (see Art. 54).

Similarly, in the case of a trust, the trust must be exclusively for such purposes. It does not prevent deduction, however, that the property placed in trust is also subject to another trust for a private purpose. Thus, where money or property is placed in trust to pay the income to an individual during life, and then to pay or deliver the same to a charitable corporation, or apply the principal to a charitable purpose, the charitable bequest or devise forms the basis for a deduction. The amount of the deduction, in such case, is the value, at the date of the decedent's death, of the remainder interest in the money or property which is devised or bequeathed to charity. For the manner of determining the value of such remainder interest, see Article 20. Gifts made in the decedent's lifetime are deductible only if made in contemplation of death, or intended to take effect at or after death, and the property is consequently included in the gross estate. Gifts made in satisfaction of a legacy are also deductible. The deduction is not limited in the case of the estates of residents to bequests to domestic corporations or to trustees for use within the United States.

ART. 56. *Conditional bequests.*—Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed. Where, by the terms of the bequest, devise or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed.

U. S. GOVERNMENT PRINTING OFFICE: 1933

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Specification of errors to be urged	4
Summary of argument	5
Argument	5
Conclusion	16
Appendix A (statute and regulations)	17
Appendix B (authorities)	19

CITATIONS

Cases:-

Allen v. *Allen's Trustee*, 141 Ky. 689	21
Ansonia National Bank v. *Kunkel*, 105 Conn. 744	22
Apgar, In re, 37 N.J.Eq. 501; 38 N.J.Eq. 549	22
Application of Smith, 94 N.J.Eq. 1	21
Aulick v. *Summers*, 186 Ky. 810	22
Azarch v. *Smith*, 222 Ky. 566	22
Bacot v. *Fessenden*, 130 App. Div. (N.Y.) 819	9
Bailey's Trustee v. *Bailey*, 30 Ky. L. Rep. 127	21
Beall v. *Wilson*, 146 Ky. 646	19
Bearden v. *White*, 42 S.W. 476 (Tenn.)	21
Bigley v. *Watson*, 98 Tenn. 353	20
Bowen v. *Frank*, 179 Ark. 1004	20
Bowlin v. *Rhode Island Hospital Trust Co.*, 31 R.I. 289	21
Brown v. *Columbia Finance & Trust Co.*, 123 Ky. 775	19
Brown v. *Owsley*, 198 Ky. 344	22
Burrell v. *Jean*, 196 Ind. 187	20
Byers v. *Beddow*, 106 Fla. 166	12, 21
Carney v. *Kain*, 40 W.Va. 758	21
Carr v. *Carr*, 106 L.T.Rep. 753	7
Clement, In re, 57 Atl. 724 (N.J.)	22
Dougan, In re, 139 Ga. 351	7, 21
Du Pont v. *Du Pont*, 159 A. 841 (Del.)	21
Dustin v. *Brown*, 297 Ill. 499	20
Farrington v. *Commissioner of Internal Revenue*, 30 F. (2d) 915, certiorari denied, 279 U.S. 873	10

Cases—Continued. Page

Fletcher v. *Los Angeles Trust and Savings Bank*, 182 Cal. 177 21
Flora v. *Anderson*, 67 Fed. 182 23
Frank v. *Frank*, 153 Tenn. 215 20
Futrell v. *Futrell's Executor*, 224 Ky. 814 20
Garner v. *Dowling*, 58 Tenn. 48 21
Gettins v. *Grand Rapids Trust Co.*, 249 Mich. 238 19
Gowen's Appeal, 106 Pa. 288 ..... 8, 20
Graves v. *Graves*, 94 N.J.Eq. 268 19
Griffiths v. *Deloitte*, [1926] Ch. 56 7
Guaranty Trust Co. v. *Commissioner of Internal Revenue*, 27 B.T.A. (decided Jan. 31, 1933) 9, 12
Hill v. *Sangamon Loan and Trust Co.*, 295 Ill. 619 ..... 11, 12, 20
Hill v. *Spencer*, 196 Ill. 65 20
Humes v. *United States*, 276 U.S. 487 6
Ithaca Trust Co. v. *United States*, 279 U.S. 151 6
Jee v. *Audley*, 1 Cox. 324 7
Johnson, Moore's Ex'or v. *Beauchamp*, 5 Dana (Ky.) 70 8
Jordan v. *Jordan*, 145 Tenn. 378 20
List v. *Rodney*, 83 Pa. 483 ..... 8, 22
Loud v. *St. Louis Union Trust Co.*, 208 Mo. 148 19
Lovering v. *Lovering*, 129 Mass. 97 19
Male v. *Williams*, 48 N.J.Eq. 33 8
May v. *Bank of Hardinsburg*, 150 Ky. 136 ..... 8, 21
Miller v. *Macomb*, 26 Wend. (N.Y.) 229 9
Oleson v. *Somogyi*, 93 N.J.Eq. 506 23
Pennsylvania Co., v. *Brown*, E. D. Pa., decided July 18, 1933 10
Perkin v. *Bland*, 122 L.T.Rep. 181 7
Quigley's Trustee v. *Quigley*, 161 Ky. 85 21
Rand v. *Smith*, 153 Ky. 516 20
Read v. *Fite*, 8 Humph. (Tenn.) 328 21
Reasoner v. *Herman*, 191 Ind. 642 19
Reeves v. *Simpson*, 182 S.W. 68 (Texas) 21
Ricard's Trust Estate, In re, 97 Md. 608 ..... 12, 13, 21
Riley v. *Riley*, 92 N.J.Eq. 465 ..... 8, 20
Rozell v. *Rozell*, 217 Mich. 324 19
Rozier v. *Graham*, 146 Mo. 352 22
Shuford v. *Brady*, 169 N.C. 224 22
Sims v. *Birden*, 197 Ala. 690 23
State v. *Lash*, 16 N.J. Law 380 23
Sterretts Estate, 300 Pa. 116 ..... 9, 20
Stout v. *Stout*, 44 N.J. Eq. 479 19
Taylor v. *Crosson*, 11 Del. Ch. 145 19
Towle v. *Delano*, 144 Mass. 95 21
Tyler v. *Fidelity & Columbia Trust Co.*, 158 Ky. 280 19

Cases—Continued. Page

U.S. Fidelity & Guaranty Co. v. *Douglas' Trustee*, 134 Ky. 374 19
Weberpals v. *Jenny*, 300 Ill. 145 22
Westhafer v. *Koons*, 144 Pa. 26 22
White v. *Allen*, 76 Conn. 185 19
White, In re, 1 Ch. 570 7
Whitney v. *Groo*, 40 App.D.C. 496 9
Williams v. *Armiger & Bro.*, 129 Md. 222 20
Williams v. *Frierson*, 150 Ga. 797 20

Statute: Revenue Act of 1918, c. 18, Sec. 403 (a) (3), 40 Stat. 1057, 1098–1099 17

Treasury Regulations, Regulations 37:

Art. 53 17
Art. 56 18

Miscellaneous:

Clark and Morris, *Radium in Gynecology*, pp. 132–133 14
MacKee—*X-ray and Radium in the Treatment of Diseases of the Skin*, pp. 208–209 14
Miller, *Clinical Gynecology*, pp. 269–270 15
67 A.L.R. 538 7
48 L.R.A. (N.S.) 865 7
23 Columbia L.Rev. 50 7

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 224

THE UNITED STATES, PETITIONER

v.

PROVIDENT TRUST COMPANY, AS ADMINISTRATOR OF the Estate of George Theodore Roberts, deceased

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 5–8) is reported in 2 F. Supp. 472.

JURISDICTION

The judgment of the Court of Claims was entered April 10, 1933. (R. 8.) The petition for a writ of certiorari was filed July 1, 1933 and the writ was granted October 9, 1933. (R. 10.) The jurisdic-

tion of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether medical testimony as to the incapacity of a woman to bear children is admissible to establish the right to deduct from the value of a testator's gross estate, under Section 403 (a)(3) of the Revenue Act of 1918, the value of bequests to charitable institutions limited upon the death of the testator's daughter without issue.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in Appendix A, *infra*, pp. 17–18.

STATEMENT

The Court of Claims made special findings of fact (R. 4–5) which may be summarized as follows:

George Theodore Roberts, a resident of the State of Pennsylvania, died testate in the year 1921. (R. 4.) In his will, after making certain bequests, he devised the residue of his estate to the respondent herein in trust to pay the income thereof to his daughter, Elizabeth Wentworth Roberts, during her natural life, and upon her death to her lawful issue; and it was further provided that in the event his daughter should die leaving no issue, the residuary estate should be distributed among certain charitable institutions and societies. (R. 4.) It is agreed that these institutions and societies are within the class of organizations bequests to which

are deductible from the gross estate of a decedent under the provisions of Section 403 (a)(3) of the Revenue Act of 1918. (R. 4.)

The testator left one child, Elizabeth Wentworth Roberts, who was born on June 10, 1871, and was 50 years of age at the time of her father's death. (R. 4.) On February 9, 1914, upon the advice of a gynecologist, she submitted to a surgical operation which resulted in the removal of the uterus, the Fallopian tubes and both ovaries. (R. 5.) After the operation it was impossible for her to become pregnant or give birth to a child. (R. 5.) She died on March 12, 1927, unmarried and without ever having given birth to a child. (R. 5.)

On November 30, 1927, the Orphans' Court of Philadelphia County, Pennsylvania, awarded the residue of the testator's estate, subject to payment of any transfer or inheritance taxes, to the organizations named in the will, as residuary legatees. (R. 5.)

The respondent was named as executor in the testator's will, which was duly probated on March 16, 1921. (R. 4.) Later, the respondent became administrator of the estate. (R. 4.) As executor, the respondent filed a Federal estate tax return and paid a tax of $5,353.70 on March 11, 1922. (R. 4.) The Commissioner of Internal Revenue subsequently imposed an additional tax of $20,701.89, which was paid by the respondent, together with interest thereon, on May 17, 1924. (R. 4.)

On August 4, 1927, the resopndent filed a claim for the refund of $18,404.05, or such greater amount as was legally refundable out of the taxes paid, on the ground that the value of the residual estate, less the value of the life estate, should have been allowed as a deduction. (R. 4.) This claim was rejected on March 2, 1928. (R. 2, 4.) Suit was brought in the Court of Claims on February 25, 1930.

The court below held that evidence of the incapacity of the life tenant to have issue was admissible and that in the light of such evidence the charitable bequests were not contingent but were certain to vest on the death of the testator's daughter. Judgment was accordingly entered for the respondent in the sum of $17,204.66, with interest.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In receiving medical testimony of the incapacity of the testator's daughter to bear children.

2. In holding, on the basis of incapacity of the testator's daughter to bear children, that deduction was allowable from the value of the testator's gross estate, under Section 403 (a)(3) of the Revenue Act of 1918, for bequests to charitable institutions upon the death of the testator's daughter without issue.

3. In giving judgment for the respondent.

SUMMARY OF ARGUMENT

The bequests were limited upon the death of the life tenant without issue. The evidence admitted was to the effect that at the time of the testator's death his daughter could never bear children. The overwhelming weight of authority in this country forbids the admission of evidence to show that a woman is incapable of bearing children so long as she lives. The rule, as stated, appears to admit of no exceptions. It has been sustained in the only other cases involving the question here presented.

The rule is based upon the unwillingness of the courts to examine the facts as to whether a woman is or is not capable of having issue. Every type of evidence is rejected whether it relates to old age, physical condition or surgery. The rule has its foundation in public policy and public morals, and a departure from it would tend to promote uncertainty and fraud. The court below was not justified in holding the rule to be inapplicable because of an apparent hardship that might result from its application in this case.

ARGUMENT

Section 403 (a) (3) of the Revenue Act of 1918 (*infra*, p. 17) and analogous provisions of other revenue statutes permit the deduction from the gross estate of a decedent, for the purpose of determining the net estate subject to tax, of the amount of bequests to charitable organizations. It

is well settled that the amount subject to tax is to be ascertained as of the date of the decedent's death (*Ithaca Trust Co.* v. *United States,* 279 U.S. 151) and that no deduction will be allowed for a charitable bequest dependent upon a condition unfulfilled at the date of the testator's death. *Humes* v. *United States,* 276 U.S. 487; Regulations 37, Art. 56, *infra,* p. 18.

The contingency in the instant case, the happening of which would, under the terms of the will, defeat the bequest to charities, is the death of the testator's daughter leaving issue. The court below concluded that at the date of the testator's death this contingency no longer existed because under the testimony of medical experts the daughter was then incapable of bearing children, so that the charities were certain to take upon her death. It accordingly held that the value of the charitable bequests as of the testator's death was deductible from the gross estate for the purposes of the estate tax.

The sole question presented is whether it was proper for the court below to admit and consider expert medical testimony that the testator's daughter had, prior to his death, submitted to an operation known as hysterectomy, which made it impossible for her thereafter to have children. The Government contended that a woman must be presumed to be capable of having issue so long as she lives, and that such presumption may not be rebutted.

The court, conceding that this rule exists in many jurisdictions, was of the opinion that the reasons usually given for holding the presumption to be conclusive were unsound and that, in any event, they were inapplicable to this type of case.

The overwhelming weight of authority in the United States holds that evidence is not admissible to show that a woman, after reaching adult age, is incapable of bearing children.[1] Whether the court uses the words "conclusive presumption of law", "presumption of law", or some other expression, the result is the same, the rule being one of substantive law rather than one governing the burden of proof or the duty of going forward with evidence.

With relatively few exceptions, the courts have regarded the principle as so firmly established that departures from precedent should be prohibited, if only for the sake of certainty and uniformity. Thus, in *In re Dougan*, 139 Ga. 351, 355, it was said:

> Whatever hardship may be worked in special instances, it would work great mischief if no settled rule existed to guide and

---

[1] The American authorities are collated in Appendix B, *infra*, pp. 19–23. See also 48 L.R.A. (N.S.) 865; 67 A.L.R. 538; 23 Col. L. Rev. 50.

In England the same rule has been strictly enforced in cases involving the rule against perpetuities (*Jee* v. *Audley*, 1 Cox Ch. Cas. 324; *Griffiths* v. *Deloitte*, [1926] Ch. 56), but in distributing estates the courts have been more liberal when the proof of incapacity seemed persuasive and distribution would deprive no living person of a possible interest. *In re White*, [1901] 1 Ch. 570; *Carr* v. *Carr*, 106 L.T.Rep. 753. Cf. *Perkin* v. *Bland*, 122 L.T.Rep. 181.

> determine the decision of judges on such a subject, leaving each case to the varying impressions to be produced by testimony. * * *

For this reason, detailed analysis of the different situations in which the rule has been enforced would appear to be of little value here. It may be observed, however, that the presumption grew up and has been most frequently invoked in connection with the ascertainment of interests in property, both real and personal, and that in relatively few instances has occasion arisen for its application in other fields of the law. See Appendix B (*infra*, pp. 19–23) where we have classified the authorities according to the subject matter of the cases.

The cases holding that evidence can be admitted to show that a woman is in fact incapable of having issue are few. *Johnson, Moore's Ex'or* v. *Beauchamp*, 5 Dana (Ky.) 70, has not been followed by the courts of Kentucky. See *May* v. *Bank of Hardinsburg & Trust Co.*, 150 Ky. 136, and other cases cited in Appendix B (*infra*, pp. 19–23). *Male* v. *Williams*, 48 N.J.Eq. 33, has apparently not been regarded as controlling in other New Jersey cases, where the presumption has been held conclusive. See *Riley* v. *Riley*, 92 N.J.Eq. 465, and other decisions listed in Appendix B (*infra*, pp. 19–23). In *Gowen's Appeal*, 106 Pa. 288, the court allowed the distribution of an estate conditioned upon the posting of a bond to protect the rights of any afterborn children. In that case *List* v. *Rodney*, 83 Pa. 483,

was distinguished on the ground that it applied only to the question of ability to convey good and marketable title to real estate, but in *Sterrett's Estate,* 300 Pa. 116, the rule was again applied with respect to "the devolution of estates." *Miller* v. *Macomb,* 26 Wend. (N.Y.) 229, *Bacot* v. *Fessenden,* 130 App. Div. (N.Y.) 819, and *Whitney* v. *Groo,* 40 App.D.C. 496, were cases involving specific performance of contracts for the sale of real estate. It can be inferred from all of these cases that the courts concluded that the possibility of issue being born to a woman long past the age for child-bearing was too remote to render unmarketable the title offered by the vendor. In *Miller* v. *Macomb, supra,* the appellate court affirmed on the ground that the parties had agreed that the possibility of issue was extinct, but expressed disapproval of any assumption that capacity had ceased by reason of age. In *Bacot* v. *Fessenden, supra,* it also appeared that the vendee knew at the time of entering into the contract that the title to the property would be affected should issue thereafter be born to a woman thought to be past the age of child-bearing.

There are two cases in which the capacity of a woman to bear children has arisen in connection with tax matters. *Farrington* v. *Commissioner,* 30 F. (2d) 915 (C.C.A. 1st), certiorari denied, 279 U.S. 873; *Guaranty Trust Co.* v. *Commissioner,* 27 B.T.A. —, decided Jan. 31, 1933, now pending on

appeal to the Circuit Court of Appeals for the Second Circuit. Both cases involved the Federal estate tax, and in both the presumption of capacity was held to be conclusive and irrebuttable. (See also *Pennsylvania Co. etc.*, v. *Brown*, E. D. Pa., decided July 18, 1933, reported in Prentice-Hall Federal Tax Service, 1933, Vol. 1A, Par. 1761.) In the *Farrington* case the court said (pp. 915, 916):

> It is elementary that Congress, in the enactment of any statute, intends it to be construed according to existing law. Wherever such a case has been presented to any court within the United States, it has been ruled that there is a presumption that women are capable of childbearing so long as they live. * * *
>
> * * * * * *
>
> If the question whether a remainder bequeathed to a town for charitable or educational purposes is to be deducted from the gross estate in determining the net estate liable to an estate tax could only be determined by evidence as to whether a woman who was a life tenant could bear a child, her physical condition in many cases not the result of age might have to be investigated.
>
> We think it is in the interests of good morals and public policy that the rule which has been so universally acted upon and which was adopted by the Board of Tax Appeals should be followed in the determination of an estate tax.

The reasons usually given for excluding evidence of the incapacity of a woman to bear children are: (1) that the age at which ability to procreate ceases cannot be ascertained with any degree of certainty; (2) that the subject is one of such delicacy that it should not be investigated in judicial proceedings; (3) that consideration of such evidence might encourage the performance of surgical operations to prevent birth of issue; and (4) that the prevailing rule tends to eliminate confusion in titles to property.

In *Hill* v. *Sangamon Loan and Trust Co.*, 295 Ill. 619, 621–622, a decision which has been frequently cited, the court said:

> Nature has fixed no certain age, by years, at which child-bearing capacity shall begin or end. Any conjecture based on age is too doubtful and uncertain to result in any reliable conclusion. If it can be determined that the possibility of issue is extinct in a woman in one case it may in another. We may concede that these life tenants have passed the age to which the ability to bear children usually continues, but the law appears to have settled the question that there is no age beyond which child-bearing is impossible. We think this rule of law sound on moral grounds and on grounds of public policy. If the rule were otherwise, surgical operations might be resorted to to make it absolutely certain that no issue could be born. * * * It is obviously not the

> province of courts of justice, and especially courts of equity, to establish any precedent which would encourage fraud or immoral acts that would result in the defeat of a settlement or the termination of a trust. The law recognizes the possibility of issue in all adult women, and the single fact that terminates the ability to bear children is death.

It happens that the great majority of the cases wherein the presumption has been held conclusive involved only old age or the physiological changes incident thereto, but the rule makes no distinction between incapacity due to age and incapacity due to artificial causes. In two cases testimony has been offered to show that the capacity to bear children had been terminated by medical treatment. Both involved the same surgical operation as was proved here (hysterectomy), and in both the evidence was held inadmissible. *Byers* v. *Beddow*, 106 Fla. 166; *Guaranty Trust Co.* v. *Commissioner*, 27 B.T.A. —, *supra*. Precedent and public policy formed the basis of the decision in each instance. The Florida court quoted with approval from the opinion in *In re Ricards' Trust Estate*, 97 Md. 608, where the danger of improper surgical operations was stressed. The same case and *Hill* v. *Sangamon Loan and Trust Co., supra*, were cited by the Board of Tax Appeals, which said:

> It may be that the cases on this subject present no more than an alleged inability to bear children due to natural causes, but nevertheless the discussions of operations in the

above quotations do not constitute dicta. They express one of the reasons for the rule. The application of the rule may not depend upon when the woman underwent the operation, nor upon whether that woman is to share in the remainder. * * *.

In *In re Ricards' Trust Estate, supra,* the Court of Appeals of Maryland said (pp. 615, 616):

> *Physical conditions have been testified to by medical witnesses who have expressed the opinion that there was no possibility of the life tenant being the mother of children. Can such evidence be received in a Court of justice to affect the devolution of property or to divert the course marked out for it to follow?* The admission of such evidence in a case like this where the avowed purpose of the proceeding is to cut out or strike down an estate in remainder, would or might be productive of most disastrous results. If, because of physical degeneracy, atrophy or decay, a medical man may, in a controversy involving title to an estate, testify that a woman is incapable of bearing children, so that a trust deliberately created for her benefit during her life only, may be brought to an end with a view of vesting an absolute interest in her; or, so that the vesting of a remainder may be accelerated: no one can foretell to what lengths such a precedent would lead. A surgical operation extirpating the uterus, for instance, would make it absolutely certain that no issue could be borne. If proof like that now under con-

> sideration were admitted, upon what principle could evidence showing that an operation of the kind indicated had been performed, be excluded? And if not excluded what would prevent interested parties from resorting to such or similar operations, if by a resort to them a mere equitable life estate could be converted into an absolute interest? *It is wholly immaterial whether the inability to bear children arises from natural or from artificial causes. It is not the cause but the fact that alone controls the question and the single fact to which the law looks is death.* (Italics ours.)

Courts may well be reluctant to permit inquiry into matters so steeped in uncertainty as the question of the efficacy of the various methods used to destroy child-bearing capacity. For example, direct applications of X-rays or radium are frequently used for this purpose, but they may cause permanent or only temporary sterility depending upon the length of the exposure and the intensity of the treatment. Moreover, accidental sterilization of either patient or operator may result from the use of X-rays and radium for other purposes. See MacKee, *X-ray and Radium in the Treatment of Diseases of the Skin*, pp. 208–209; Clark and Norris, *Radium in Gynecology*, pp. 132–133. Whether sterility has resulted from accidental or intentional exposure to the rays cannot be definitely ascertained and the unreliability of testimony on this subject is enhanced when, as is frequently the

case, the question does not arise until some time after exposure has taken place. Likewise, certain surgical methods which have been employed to produce sterility have been found to be of doubtful efficacy, and in some instances the capacity to reproduce which has been only temporarily suspended may be subsequently restored. See Miller, *Clinical Gynecology*, pp. 269–270. It is, therefore, wholly within the realm of possibility that a life tenant who was considered incapable of bearing children at the time of the testator's death might later have offspring whose birth would defeat a contingent remainder. Medical testimony on matters of this kind is likely to be conflicting, and the substitution of prevailing medical opinion for the certainty of the present rule seems highly undesirable.

The courts of this country generally have considered the presumption to be of sufficient value to warrant them in adhering to it in the face of arguments in favor of its abandonment in individual cases. It has been felt that to permit an entering wedge in the form of exceptions to the general rule would have far-reaching consequences of an undesirable character. The court below was of the opinion that no harm could result from the admission of the evidence tendered. We submit, however, that the rule which has survived for many years should not be discarded upon a showing of hardship in individual cases.

CONCLUSION

We submit that the judgment of the Court of Claims should be reversed and the case remanded with instructions to dismiss the petition.

Respectfully submitted.

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NOVEMBER 1933.

APPENDIX A

Section 403 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1098–1099, provides in part as follows:

> That for the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> * * * * *
>
> (3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. * * *

Treasury Regulations 37 provide in part as follows:

> ART. 53. *Public, charitable, and similar bequests.*—Bequests to religious, charitable, scientific, literary, or educational corporations are deductible only if the corporation is organized or operated exclusively for one of the purposes specified (see Art. 54).

Similarly, in the case of a trust, the trust must be exclusively for such purposes. It does not prevent deduction, however, that the property placed in trust is also subject to another trust for a private purpose. Thus, where money or property is placed in trust to pay the income to an individual during life, and then to pay or deliver the same to a charitable corporation, or apply the principal to a charitable purpose, the charitable bequest or devise forms the basis for a deduction. The amount of the deduction, in such case, is the value, at the date of the decedent's death, of the remainder interest in the money or property which is devised or bequeathed to charity. For the manner of determining the value of such remainder interest, see Article 20. Gifts made in the decedent's lifetime are deductible only if made in contemplation of death, or intended to take effect at or after death, and the property is consequently included in the gross estate. Gifts made in satisfaction of a legacy are also deductible. The deduction is not limited in the case of the estates of residents to bequests to domestic corporations or to trustees for use within the United States.

ART. 56. *Conditional bequests.*—Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed. Where, by the terms of the bequest, devise or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed.

APPENDIX B

AMERICAN AUTHORITIES ON THE QUESTION OF CAPACITY OF A WOMAN TO BEAR CHILDREN SO LONG AS SHE LIVES

The following cases involved the rule against perpetuities, it being held that remoteness could not be avoided by allegation, agreement or proof that a woman was, by reason of age, incapable of bearing children:

CONNECTICUT:

White v. *Allen*, 76 Conn. 185 (1903)

DELAWARE:

Taylor v. *Crosson*, 11 Del. Ch. 145 (1916)

INDIANA:

Reasoner v. *Herman*, 191 Ind. 642 (1922)

KENTUCKY:

Beall v. *Wilson*, 146 Ky. 646 (1912)

Brown v. *Columbia Finance & Trust Co.*, 123 Ky. 775 (1906)

Tyler v. *Fidelity & Columbia Trust Co.*, 158 Ky. 280 (1914)

U.S. Fidelity & Guaranty Co. v. *Douglas' Trustee*, 134 Ky. 374 (1909)

MASSACHUSETTS:

Lovering v. *Lovering*, 129 Mass. 97 (1880)

MICHIGAN:

Gettins v. *Grand Rapids Trust Co.*, 249 Mich. 238 (1930)

Rozell v. *Rozell*, 217 Mich. 324 (1922)

MISSOURI:

Loud v. *St. Louis Union Trust Co.*, 298 Mo. 148 (1923)

NEW JERSEY:

Graves v. *Graves*, 94 N.J.Eq. 268 (1923)

Stout v. *Stout*, 44 N.J.Eq. 479 (1888)

In the following cases involving determination of title and the right to distribution or partition under wills and deeds the presumption in favor of child-bearing capacity was held to be conclusive:

ARKANSAS:
Bowen v. *Frank*, 179 Ark. (2d) 1004 (1929)
GEORGIA:
Williams v. *Frierson*, 150 Ga. 797 (1921)
ILLINOIS:
Dustin v. *Brown*, 297 Ill. 499 (1921)
Hill v. *Sangamon Loan & Trust Co.*, 295 Ill. 619 (1920)
Hill v. *Spencer*, 196 Ill. 65 (1902)
INDIANA:
Burrell v. *Jean*, 196 Ind. 187 (1925)
KENTUCKY:
Futrell v. *Futrell's Executor*, 224 Ky. 814 (1928)
Rand v. *Smith*, 153 Ky. 516 (1913)
MARYLAND:
Williams v. *Armiger & Bro.*, 129 Md. 222 (1916)
NEW JERSEY:
Riley v. *Riley*, 92 N.J. Eq. 465 (1921)
PENNSYLVANIA:
Gowen's Appeal, 106 Pa. 288 (1884)
Sterrett's Estate, In re, 300 Pa. 116 (1930)
TENNESSEE:
Bigley v. *Watson*, 98 Tenn. 353 (1897)
Frank v. *Frank*, 153 Tenn. 215 (1925)
Jordan v. *Jordan*, 145 Tenn. 378 (1922)

The presumption was regarded as conclusive, except as otherwise noted, in the following cases involving the termination of trusts:

CALIFORNIA:
Fletcher v. *Los Angeles Trust & Savings Bank*, 182 Cal. 177 (1920)
DELAWARE:
Du Pont v. *Du Pont*, 159 Atl. 841 (1932)
FLORIDA:
Byers v. *Beddow*, 106 Fla. 166 (1932)
GEORGIA:
Dougan, In re, 139 Ga. 351 (1913)
KENTUCKY:
Allen v. *Allen's Trustee*, 141 Ky. 689 (1911)
Bailey's Trustee v. *Bailey*, 30 Ky. L. Rep. 127 (1906)
May v. *Bank of Hardinsburg & Trust Co.*, 150 Ky. 136 (1912)
Quigley's Trustee v. *Quigley*, 161 Ky. 85, rehearing denied, 162 Ky. 754 (1914)
MARYLAND:
Ricard's Trust Estate, In re, 97 Md. 608 (1903)
MASSACHUSETTS:
Towle v. *Delano*, 144 Mass. 95 (1887)
NEW JERSEY:
Smith, Application of, 94 N.J.Eq. 1 (1922)
RHODE ISLAND:
Bowlin v. *Rhode Island Hospital Trust Co.*, 31 R.I. 289 (1910)
TENNESSEE:
Bearden v. *White*, 42 S.W. 476 (1897)
Garner v. *Dowling*, 58 Tenn. 48 (1872)
Read v. *Fite*, 8 Humph. 328 (1847)
TEXAS:
Reeves v. *Simpson*, 182 S.W. 68 (1915)
WEST VIRGINIA:
Carney v. *Kain*, 40 W.Va. 758 (1895)

In the following cases it has been held that the presumption in favor of issue made it impossible for a vendor to convey clear title, and specific performance was denied:

ILLINOIS:

Weberpals v. *Jenny,* 300 Ill. 145 (1921).

KENTUCKY:

Aulick v. *Summers,* 186 Ky. 810 (1920).

Azarch v. *Smith,* 222 Ky. 566 (1928).

Brown v. *Owsley,* 198 Ky. 344 (1923).

MISSOURI:

Rozier v. *Graham,* 146 Mo. 352 (1898).

NORTH CAROLINA:

Shuford v. *Brady,* 169 N.C. 224 (1915).

PENNSYLVANIA:

List v. *Rodney,* 83 Pa. 483 (1877).

The following cases involved suits under acts providing for sale of land under special circumstances:

Apgar, In re, 37 N.J.Eq. 501 (1883)—Suit under statute permitting sale of land subject to contingent limitations; *held* that probability of incapacity at age 58 would not defeat the court's jurisdiction. Reversed on other grounds, *sub. nom. Apgar* v. *Apgar,* 38 N.J.Eq. 549.

Clement, In re, 57 Atl. 724 (N.J.).

Westhafer v. *Koons,* 144 Pa. 26 (1891)—Statute permitting sale of land subject to contingent remainder; *held,* in effect, that the contingency, although remote, formed the basis of the action.

In the following cases the presumption was discussed in connection with the determination of the intent of a testator.

Ansonia National Bank v. *Kunkel,* 105 Conn. 744 (1927)—*held* that the presumption that testatrix's sister might have chil-

dren, although aged 61 at the date of the will, cannot be used to show that the testatrix meant by "issue" of the sister issue of her body to the exclusion of an adopted child.

Oleson v. *Somogyi,* 93 N.J.Eq. 506 (1921)—lower court held that since the testatrix who had one child, was too old at the date of the will to have more, the words "next of kin", being plural, must have referred to persons other than the child. Affirmed on other grounds, the above statement being disapproved.

Flora v. *Anderson,* 67 Fed. 182 (C.C., S.D. Ohio.)—presumption held conclusive where it was sought to show that an illegitimate child of the daughter should take as "issue" because at the date of the will the daughter was 50 and had no legitimate children.

The presumption was also discussed in the following miscellaneous decisions:

Sims v. *Birden,* 197 Ala. 690 (1916), where the question was whether complainant was the daughter of X, who would have been 50 at the date of complainant's birth, and the court said there was no presumption of *incapacity* at age 50.

State v. *Lash,* 16 N.J.L. 380 (1838), where it was suggested that an action for adultery at common law could not be defeated by proof that the woman was past the age of procreation, since she would be presumed capable of bearing children until she died.

U.S. GOVERNMENT PRINTING OFFICE: 1933

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Statement of the Case	2
Question Presented	2
Statute and Regulations Involved	3
Argument	3
Conclusion	7
Appendix (statute and regulations)	8

TABLE OF CITATIONS

Cases:	
Bacot v. *Fessenden*, 130 App. Div. (N. Y.) 819	6
Edwards v. *Slocum*, 264 U. S. 61	7
Farrington v. *Commissioner of Internal Revenue*, 30 F. (2d) 915	6
Farrington v. *Commissioner*, 13 B. T. A. 274	5
Gowen's Appeal, 106 Pa. 288	6
Guaranty Trust Co. v. *Commissioner of Internal Revenue*, 27 B. T. A.	6
Hill v. *Sangamon Loan & Trust Co.*, 295 Ill. 619	3, 4
Hill v. *Spencer*, 196 Ill. 65	4
Ithaca Trust Co. v. *United States*, 279 U. S. 151	7
Johnson v. *Beauchamp*, 5 Dana (Ky.) 70	6
List v. *Rodney et al.*, 83 Pa. 483	4
Mackenzie v. *King*, 17 L. J. Ch. N. S. 448	7
Male v. *Williams*, 48 N. J. Eq. 33	6
White, In Re, (1901) 1 Ch. 570	7
Whitney v. *Groo*, 40 App. D. C. 496	6
Statutes:	
Act of February 13, 1925, c. 229, 43 Stat. 936—Section 3 (b)	2
Revenue Act of 1918, c. 18, Sec. 403, 40 Stat. 1057, 1098-1099	8
Treasury Regulations:	
Regulations 37—Article 53	8
Article 56	9
Miscellaneous:	
17 Corpus Juris 1167	5
23 Corpus Juris 1007, 1008	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 224

THE UNITED STATES,

Petitioner,

v.

PROVIDENT TRUST COMPANY, as Administrator of the Estate of GEORGE THEODORE ROBERTS, Deceased,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims is reported in 2 F. Supp. 472.

JURISDICTION

The judgment of the Court of Claims was entered April 10, 1933. The petition for a writ of certiorari was filed July 1, 1933. The jurisdiction of this Court is invoked under section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936.

STATEMENT OF THE CASE

The petitioner's statement of facts is accurate. It omits, however, certain findings of the Court of Claims which, because they may be of material importance, are summarized as follows:

The testator's daughter, Elizabeth Wentworth Roberts, consulted the gynecologist upon the direction of her attending physician. The operation and removal of the uterus with the tumor, the Fallopian tubes, and both ovaries were necessary to prevent further impairment of her health. (R. 5.)

QUESTION PRESENTED

Whether the testamentary provision making the charitable bequests and devises contingent upon the life beneficiary's death without issue should defeat the deduction, otherwise clearly authorized by section 403 (a) (3) of the Revenue Act of 1918, of the value of such bequests and devises when a surgical operation, essential to the protection of the life beneficiary's health and performed several years before the testator's death, had destroyed all possibility of issue and made the bequests and devises of the property to the charitable organizations a certainty.

Statute and Regulations Involved

The statute and regulations involved appear in the Appendix, *infra*, pp. 8-9.

Argument

The decision in this case turns entirely upon the admissibility of evidence. The United States contends for a medieval and artificial rule which would exclude that evidence while the claimant contends for facts as they actually exist.

The petitioner tacitly admits that the evidence of the removal of the reproductive organs conclusively establishes *in fact* that the life tenant, upon whose death without issue the charitable bequests were dependent, could not have become pregnant nor borne issue, but urges that the authorities do not permit of a consideration of such evidence regardless of its character or the circumstances under which it is offered. It is submitted that the prevailing judicial view, as expressed in the cases cited by petitioner, is not inconsistent with the consideration of the evidence in the case at bar.

None of the reasons, aggregating four in number, advanced for excluding evidence of incapacity in the decisions relied upon by the petitioner are applicable to the instant case. Let us consider each of these reasons.

First, it has been said, as in *Hill* v. *Sangamon Loan and Trust Company*, 295 Ill. 619, 621, 622, that the impossibility of fixing any particular age when repro-

ductive capacity ceases makes the determination of incapacity from age (and the physiological changes related to age) too conjectural and unreliable to permit of evidence of that character. Even the court which so declared has, however, indicated that other evidence of definite character may establish incapacity. In *Hill* v. *Spencer*, 196 Ill. 65, 70, the Supreme Court of Illinois said:

> "The allegation that Martha Hill is past the time of life to have children is meaningless, as she is, in law, presumed to be capable of bearing children as long as she lives, *unless more than a mere matter of age is stated in the bill.*" (Italics ours.)

But in the present case the evidence does not involve age nor related physiological change; incapacity is established beyond conjecture or doubt.

Second, it has been suggested, as in *List* v. *Rodney et al.*, 83 Pa. 483, that "the indelicacy of the acts to which such an inquiry might lead" justifies the exclusion of evidence of physiological change. But there is no indelicacy in admitting evidence of the instant character.

Third, it has been stated that, if evidence of incapacity were admitted, "surgical operations might be resorted to to make it absolutely certain that no issue could be born." *Hill* v. *Sangamon Loan and Trust Company*, 295 Ill. 619. The reason is inapplicable here. It is practically inconceivable that there could have been any circumstance to cause the patient, the

surgeon, or the fourteen charitable organizations to participate in an improper operation of this nature. The operation was performed, not in violation of public morals, but to preserve the patient's health.

Fourth, the exclusion of evidence of incapacity has sometimes been supported by the statement that its admission would promote uncertainty in property titles. *Farrington* v. *Commissioner*, 13 B. T. A. 274. But law, which presumes death after an unexplained absence of seven years (17 Corpus Juris 1167) and directs the administration of the absentee's estate (23 Corpus Juris 1007, 1008) is hardly so incongruous as to fear a confusion of titles where, as here, incapacity is conclusively proved, where the incapacitated individual has died without issue before the litigation is commenced, and where the question of title to property is in no respect involved.

But the decisions cited to support the petitioner's position are inadequate for the purpose, not alone in the inapplicability of the reasons set forth in the opinions to the circumstances of the case at bar, but also in the important differences between the vital facts in those cases and the facts in the instant proceeding. In all but two of the cases cited for the petitioner there was involved in connection with the evidence of incapacity the question of the title or interest in property, and in all but one of the cases the evidence was confined to age with supporting testimony in a few instances of related physiological change. Thus with the two exceptions noted (to be considered presently), the facts are distinguishable from those in this case on matters of controlling importance.

One of the two exceptions is the decision in *Farrington* v. *Commissioner of Internal Revenue*, 30 F. (2d) 915, the decision chiefly commented upon by the petitioner. In that case the evidence was limited to age and the occurrence of the menopause, and one of the expert witnesses for the petitioner admitted that in rare instances women had given birth to children under similar circumstances. Hence, although admittedly some of the statements in the majority opinion of the court conflict with certain statements of the Court of Claims in this proceeding, the cases are readily distinguishable on the facts.

The other exception referred to above is the decision of the United States Board of Tax Appeals in *Guaranty Trust Co.* v. *Commissioner of Internal Revenue*, 27 B. T. A. —, decided January 31, 1933. There was no evidence that the operation was necessary to preserve the patient's health and the life tenant *had not died without issue* as here, but in other respects the facts were virtually the same as here. It is submitted that the decision is not sound. The case is now on appeal to the United States Circuit Court of Appeals for the Second Circuit.

Affirmatively, the following United States decisions support the admissibility of evidence on incapacity. *Male* v. *Williams*, 48 N. J. Eq. 33; *Whitney* v. *Groo*, 40 App. D. C. 496; *Johnson* v. *Beauchamp*, 5 Dana (Ky.) 70; *Gowen's Appeal*, 106 Pa. 288; *Bacot* v. *Fessenden*, 130 App. Div. (N. Y.) 819. In none of those cases were the facts as compelling for the admission of evidence of incapacity as here. These decisions are, therefore, authoritative support for the decision below. In addition there are numer-

ous English decisions admitting evidence of this character. *Mackenzie* v. *King*, 17 L. J. Ch. N. S. 448; *In re White* (1901), 1 Ch. 570, and cases therein cited.

Conclusion

It is the purpose of the statute to encourage charitable bequests (*Edwards* v. *Slocum*, 264 U. S. 61); and to require no more certainty in the evidence of value than is generally found in "human affairs" (*Ithaca Trust Company* v. *United States*, 279 U. S. 151). The decision below conforms to those purposes and is in harmony with the weight of authority. The petition for certiorari should be denied.

Respectfully submitted,

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August, 1933.

APPENDIX

Section 403 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1098-1099, provides in part as follows:

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>
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>
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in trust is also subject to another trust for a private purpose. Thus, where money or property is placed in trust to pay the income to an individual during life, and then to pay or deliver the same to a charitable corporation, or apply the principal to a charitable purpose, the charitable bequest or devise forms the basis for a deduction. The amount of the deduction, in such case, is the value, at the date of the decedent's death, of the remainder interest in the money or property which is devised or bequeathed to charity. For the manner of determining the value of such remainder interest, see Article 20. Gifts made in the decedent's lifetime are deductible only if made in contemplation of death, or intended to take effect at or after death, and the property is consequently included in the gross estate. Gifts made in satisfaction of a legacy are also deductible. The deduction is not limited in the case of the estates of residents to bequests to domestic corporations or to trustees for use within the United States.

ART. 56. *Conditional bequests.*—Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed. Where, by the terms of the bequest, devise or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement of the case	2
Summary of argument	3
Argument	3
I. Modern medical knowledge and scientific certainty have made the rule contended for by the United States obsolete and inapplicable in this case	4
II. None of the reasons underlying the frequent refusal of the courts to hold that a woman is incapable of bearing children are applicable here	8
(a) The difficulty of fixing an age, or precise natural physiological change, subsequent to which a woman's capacity to bear children shall be considered at an end, is not involved here	9
(b) Some courts have excluded evidence of physiological condition on the ground of the indelicacy of the required proof; such reason does not exist here	10
(c) Evidence of incapacity is said to have been barred on the ground that the consideration of such evidence would induce surgical operations to prevent the birth of issue; this reason is inapplicable here	11
(d) It is occasionally stated that evidence of incapacity should be excluded to maintain the title to property free from confusion; no such confusion can arise here	12
III. Without the evidence as to incapacity the true value of the estate for tax purposes cannot be computed	13
Conclusion	15
Appendix A	17

CITATIONS

Page

Cases:

Alabama G. S. R. R. Co. v. *Hill*, 93 Ala. 514 ---- 7
Ansonia National Bank v. *Kunkel*, 105 Conn. 744 ---- 7
Apgar v. *Apgar*, 38 N. J. Eq. 549 ---- 7
Bacot v. *Fessenden*, 130 App. Div. (N. Y.) 819 ---- 7
Bowlin v. *Rhode Island Hospital Trust Company*, 31 R. I. 289 ---- 7
Brown v. *Pringle*, 4 Hare 124 ---- 7
Byers v. *Beddow*, 106 Florida 166 ---- 6, 8
Denver & R. G. Ry. v. *Harris*, 122 U. S. 597, 7 Sup. Ct. 1286. 30 L. ed. 1146 ---- 7
Edwards v. *Slocum*, 264 U. S. 61; 68 L. ed. 564 ---- 15
Edwards v. *Tuck*, 3 De G. M. & G. 39 ---- 7
Farrington v. *Commissioner*, 30 F. (2d) 915, certiorari denied, 279 U. S. 873 ---- 13
Farrington v. *Commissioner*, 13 B. T. A. 274 ---- 14
First National Bank of Birmingham, Exr. Patterson v. *Snead*, 24 F. (2d) 186 ---- 14
Gowen's Appeal, 106 Pa. 288 ---- 7
Guaranty Trust Co. v. *Commissioner*, 27 B. T. A. 550 ---- 6, 8
Haynes v. *Haynes*, 35 L. J. (Ch) 303 ---- 7
Hill v. *Sangamon Loan and Trust Company*, 295 Ill. 619. 129 N. E. 554 ---- 7, 9, 11
Hill v. *Spencer*, 196 Ill. 65 ---- 9
Humes v. *United States*, 48 Sup. Ct. 347, 276 U. S. 487 ---- 14
Ithaca Trust Company v. *United States*, 279 U. S. 151; 73 L. ed. 647 ---- 14, 15
Johnson v. *Beauchamp*, 5 Dana (Ky.) 70 ---- 7
Leng v. *Hodges*, Jac. 585 ---- 7
List v. *Rodney, et al.*, 83 Pa. 483 ---- 10
Mackenzie v. *King*, 17 L. J. Ch. N. S. 488 ---- 7
Male v. *Williams*, 48 N. J. Eq. 33 ---- 7
Normile v. *Wheeling T. Co.*, 57 W. Va. 132 ---- 7
Partridge v. *Boston & M. R. Co.*, 184 Fed. 211 (C. C. A. 1st) ---- 7
Staheli, In re, 78 N. J. Eq. 74 ---- 7
United States v. *Provident Trust Company and Sinkler, Administrators*, 281 U. S. 497, 74 L. ed. 991 ---- 5
White, In Re, 1 Ch. 570 (1901) ---- 7
Whitney v. *Groo*, 40 App. D. C. 496 ---- 7

Statute:

Section 403 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1098-1099 ---- 2, 17

Treasury Regulations:

Regulations 37

Art. 53 ---- 17
Art. 56 ---- 18

Miscellaneous:

	Page
2 Blackstone's Commentaries, 125	4, 5
Coke on Littleton, 28	4
23 Col. L. Rev. 53	13
Corpus Juris, Vol. 17, p. 1167	13
Corpus Juris, Vol. 23, pp. 1007, 1008	13
Keen's Surgery, Vol. 1, Chap. 1, p. 58	5
Keen's Surgery, Vol. 1, Chap. 1, p. 61	6
Littleton's Tenures (1592 edition), fol. 8	4
Sedgwick on Damages (ninth edition). Vol. 1, Sec. 41a	7
Wigmore's Evidence, Vol. I, Secs. 10, 11	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 224

THE UNITED STATES,

Petitioner,

v.

PROVIDENT TRUST COMPANY, as Administrator of the Estate of GEORGE THEODORE ROBERTS, Deceased,

Respondent.

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Claims (R. 5-8) is reported in 2 F. Supp. 472.

JURISDICTION

The judgment of the Court of Claims was entered April 10, 1933. (R. 8.) The petition for writ of cer-

tiorari was filed July 1, 1933, and the writ was granted October 9, 1933. (R. 10.) The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

The sole question is whether medical testimony that the reproductive organs of a testator's daughter had been removed prior to his death, and that therefore she was incapable of bearing a child, is admissible to establish the right to deduct from the value of the testator's gross estate, under Section 403 (a) (3) of the Revenue Act of 1918, the value of bequests to charitable institutions limited upon the death of the testator's daughter without issue.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in Appendix A, *infra*, pp. 17-18.

STATEMENT OF THE CASE

The petitioner's statement of facts is accurate. It omits, however, certain findings of the Court of Claims which, because they are of material importance, should be added. They are summarized as follows:

The testator's daughter, Elizabeth Wentworth Roberts, consulted the gynecologist upon the direction of her attending physician. The operation and removal of the uterus with the tumor, the Fallopian tubes, and both ovaries were necessary to prevent further impairment of her health. (R. 5.)

SUMMARY OF ARGUMENT

The truth should be kept from the Court only if a public policy of greater consequence demands. The rule relied upon by the appellant to exclude the truth has been rendered obsolete and inapplicable to this case by modern medical knowledge and scientific certainty. The reasons assigned by the courts for the rule have no application to the circumstances in this case. Public policy requires the evidence for the proper and adequate administration of the taxing laws. There is, in this case, no public policy requiring the withholding from the Court of the facts.

ARGUMENT

The decision in this case turns entirely upon the admissibility of evidence. The Court below has proceeded upon the rule that " 'All facts having rational probative value are admissible, unless some specific rule forbids.' "[1]

Examining this rule the Court has determined that if the evidence is to be excluded, it must be " 'because its admission would injure some other cause more than it would help the cause of truth, and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth.' "[2]

Believing that truth should prevail as against inapplicable and archaic rules of exclusion, the Court

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1. This quotation in the opinion below (R. 6) was taken from *Wigmore's Evidence*, Vol. I, Sec. 10.
2. This quotation in the opinion below (R. 6) was taken from *Wigmore's Evidence*, Vol. I, Sec. 11.

in view of the undeniable facts in this case, has admitted the evidence in dispute. We believe that there was no error in that decision.

I

Modern Medical Knowledge and Scientific Certainty Have Made the Rule Contended for by the United States Obsolete and Inapplicable in this Case.

Research develops that no legal writer before Littleton refers to the rule urged by the petitioner. Littleton said:

> "* * * for the donee in general taile may never be said tenant in the taile after possibilitie of issue extinct, for that alway during his life, hee may by possibilitie have issue that may inherite by force of the same taile."[3]

Coke commented on Littleton as follows:

> "But if a man giveth land to a man and his wife, and to the heires of their two bodies, and they live till each of them bee C. yeere old, and have no issue, yet doe they continue tenant in taile, for that the Law seeth no impossibilitie of having children."[4]

And Blackstone, citing Littleton and Coke, said:

> "A possibility of issue is always supposed to exist in law, unless extinguished by the death

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3. *Littleton's Tenures* (1592 edition), fol. 8. This work was first published in 1481 or 1482.
4. *Coke on Littleton*, 28.

of the parties; even though the donees be each of them an hundred years old."[5]

These comments are made in connection with estates tail for the purpose of showing that a fee tail general cannot become a fee tail with possibility of issue extinct and that a fee tail special arises only upon the death of one of the spouses. They appear to be the product of logicians in tenure and have an extremely remote, if any, connection with a Federal estate tax dispute arising under modern American statutes.[6]

The rule arose in the latter part of the fifteenth century when medical knowledge was meagre, and more than three hundred years before abdominal surgery was practical. In the then state of medicine and surgery it was impossible to determine as a fact that either the male or female was incapable of procreation,—hence the rule. It was not until 1809 that an ovariotomy was performed.[7] General anaesthetics had not then been invented, and it was not until the use of ether as an anaesthetic by Morton in

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5. 2 *Blackstone's Commentaries*, 125.

6. The plaintiff in the case at bar has already appeared in a representative capacity before this Court in reliance upon a common law fiction still adhered to in the State of Pennsylvania only to find that this Court insisted upon deciding the issue upon "the actual results brought about by the death, rather than by a consideration of the artificial rules" which delimit the title, rights and powers of tenants by the entirety at common law. *United States* v. *Provident Trust Company and Sinkler, Administrators*, 281 U. S. 497, 74 L. ed. 991. If the "amiable" but venerable fiction in that procedure, a recognized rule of property law, did not bar a consideration by this Court of the actual facts it would appear that an archaic fiction of the adjective law should be no greater deterrent in the present procedure.

7. *Keen's Surgery*, Vol. 1, Chap. 1, p. 58.

1846[8] that abdominal surgery became practical. From that time operations such as that with which we are concerned could be successfully performed, and then for the first time in history was it possible for anyone to state as a fact that a woman was incapable of bearing children.

The modernity of medical knowledge is emphasized by the fact that of all the cases cited involving incapacity of a woman to bear children it appears that only three involved surgical operations.[9] The absence of such cases emphasizes the fact that the chief practical difficulty in the cases which have heretofore come before the courts has been the inconclusiveness of the evidence offered. In the case at bar we appear apparently for the third time in history with conclusive evidence that the woman involved was incapable of giving birth to a child at the time when such query arose. Only in a contemporary case[10] has a similar situation arisen. In respect to both the surgical features and the certainty of the fact, these two cases are novel.

That the rule has rested on ignorance and uncertainty and not on knowledge, will best be demonstrated by reading the cases cited in the petitioner's brief (pp. 7 to 14) and the appendix thereto. In every case the character of the evidence tending to

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8. *Keen's Surgery*, Vol. 1, Chap. 1, p. 61.

9. *Byers* v. *Beddow*, 106 Florida 166 (1932); *Guaranty Trust Co.* v. *Commissioner*, 27 B. T. A. 550 (1933), (decided 6 days before the case at bar and now on appeal in the United States Circuit Court of Appeals for the Second Circuit), and the instant case.

10. *Guaranty Trust Company* v. *Commissioner*, 27 B. T. A. 550, decided January 31, 1933. In *Byers* v. *Beddow*, 106 Fla. 166 (1932), the character of the operation does not appear from the opinion of the court.

show incapacity appears to have been considered and the judgments of the courts will be seen in large measure to have been formed from the facts appearing in the evidence offered. Uncertain as to the impossibility of issue from the evidence presented, the courts have fallen back on the ancient formula as a safer guide. See *Hill* v. *Sangamon Loan and Trust Company*, 295 Ill. 619; *Bowlin* v. *Rhode Island Hospital Trust Company*, 31 R. I. 289.

Nevertheless courts in the United States have frequently recognized incapacity to bear children where the evidence was less conclusive than here.[11] And the British courts have, except where the property interests of living persons would be adversely affected, regularly admitted such evidence.[12] Moreover, in the field of law pertaining to damages for personal injury, it appears to be the universal rule that evidence will be received to show that the injury destroyed the power to bear issue. This Court has in fact so held.[13] It would thus seem that the courts in the United States are not so overwhelmingly averse

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11. *Whitney* v. *Groo*, 40 App. D. C. 496; *Johnson* v. *Beauchamp*, 5 Dana (Ky.) 70; *Male* v. *Williams*, 48 N. J. Eq. 33; *Gowen's Appeal*, 106 Pa. 288; *Bacot* v. *Fessenden*, 130 App. Div. (N. Y.) 819; *Ansonia National Bank* v. *Kunkel*, 105 Conn. 744. See also *Apgar* v. *Apgar*, 38 N. J. Eq. 549; *In re Staheli*, 78 N. J. Eq. 74, 77.

12. Among the many British cases recognizing impossibility of issue are the following: *Mackenzie* v. *King*, 17 L. J. Ch. N. S. 488 (1848); *In re White*, 1 Ch. 570 (1901); *Leng* v. *Hodges*, Jac. 585 (1822); *Edwards* v. *Tuck*, 3 De G. M. & G. 39 (1853); *Brown* v. *Pringle*, 4 Hare 124 (1845); *Haynes* v. *Haynes*, 35 L. J. (Ch) 303 (1866).

13. *Denver & R. G. Ry.* v. *Harris*, 122 U. S. 597, 7 Sup. Ct. 1286 30 L. ed. 1146. See also *Normile* v. *Wheeling T. Co.*, 57 W. Va. 132; *Sedgwick on Damages* (ninth edition), Vol. 1, Sec. 41a; *Partridge* v. *Boston & M. R. Co.*, 184 Fed. 211 (C. C. A. 1st); *Alabama G. S. R. R. Co.* v. *Hill*, 93 Ala. 514.

to the recognition of modern medical knowledge on this subject as petitioner's brief would imply.[14]

It appears important to point out again that in all but two of the large number of cases pertaining to property interests the evidence is *opinion* evidence. It may be amazing but it appears to be true that the case at bar and the cases of the *Guaranty Trust Company* v. *Commissioner*, 27 B. T. A. 550 (decided six days before the decision of the Court of Claims in the instant case), and *Byers* v. *Beddow*, 106 Fla. 166 (1932), are unique. In them alone are we able to discover that positive testimony has been offered that child birth was scientifically impossible.

As a consequence the petitioner relies upon a presumption, the product of the artificial reasoning necessary to round out an intricate medieval concept. With the appearance of modern abdominal surgery the ancient presumption has become a demonstrable fiction—a bar to the truth—to be continued only if overwhelmingly desirable in the public interest. No such desirability exists here.

II

None of the Reasons Underlying the Frequent Refusal of the Courts to Hold That a Woman Is Incapable of Bearing Children Are Applicable Here.

None of the reasons advanced in those decisions which have held that a woman is presumed, notwithstanding the evidence adduced, to be able to bear children at any time are pertinent to the case at bar.

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14. Petitioner's brief, p. 7.

The rule was present before the reasons since assigned. The reasons are excuses.

(a) *The Difficulty of Fixing an Age, or Precise Natural Physiological Change, Subsequent to Which a Woman's Capacity to Bear Children Shall Be Considered at an End, Is Not Involved Here.*

It has been said that the impossibility of fixing any particular age at which a woman's child-bearing capacity ceases makes the determination of incapacity from age conjectural and unreliable. *Hill* v. *Sangamon Loan and Trust Company*, 295 Ill. 619, 621, 622. Even the Court which so declared, however, has indicated that other evidence of definite character may establish the incapacity to bear issue. In *Hill* v. *Spencer*, 196 Ill. 65, 70, the Supreme Court of Illinois said:

> "The allegation that Martha Hill is past the time of life to have children is meaningless, as she is, in law, presumed to be capable of bearing children as long as she lives, *unless more than a mere matter of age is stated in the bill.*" (Italics ours.)

The facts in the instant case, moreover, stand in unmistakable contrast to those in which the courts have excluded evidence of age and mere natural physiological conditions. In those cases the evidence varies in certainty a[illegible]ere are inherent difficulties in fixing a definit[illegible]ne between capacity and incapacity. In the [illegible]esent case there is conclusiveness

beyond doubt. Thus, one of the reasons for applying the rule fails.

The United States in its brief refers to the use of X-ray or radium to produce sterility, and quotes medical authority[15] to the effect that the sterility produced may not be lasting. That merely demonstrates that an opinion as to the capability to bear children is unreliable. In the instant case we are not dealing with opinion but fact.

(b) *Some Courts Have Excluded Evidence of Physiological Condition on the Ground of the Indelicacy of the Required Proof; Such Reason Does Not Exist Here.*

It has sometimes been suggested that "the indelicacy of the facts to which such an inquiry might lead" may justify the exclusion of evidence of physiological change. *List* v. *Rodney, et al.*, 83 Pa. 483 (1877). Whatever may have been judicial opinion on the propriety of indelicate disclosures in 1877, the facts of medical science are no longer to be withheld from the legal knowledge of courts in contrast to their lay knowledge. In the present day further urging is hardly required for this assertion. This court is not to be fettered in arriving at the truth by such an outworn inhibition, permissible as it may have been in the day it was announced. Surely, the function of a court today is to be just before it is "delicate." "Ye shall know the truth, and the truth shall make you free."

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15. Petitioner's brief, p. 14.

(c) *Evidence of Incapacity Is Said to Have Been Barred on the Ground that the Consideration of Such Evidence Would Induce Surgical Operations to Prevent the Birth of Issue; This Reason Is Inapplicable Here.*

It has been stated that, if evidence of incapacity were admitted, "surgical operations might be resorted to, to make it absolutely certain that no issue could be born." *Hill* v. *Sangamon Loan and Trust Company*, 295 Ill. 619, 129 N. E. 554. Whatever may have been the basis for the fears of that court that it could not control the situation where improper surgical operations might be resorted to, such a reason is wholly invalid in the present case. The operation here was performed, not in violation of public morals, but to preserve the patient's health and possibly her life. No possible advantage could lie to the merely potential life beneficiary (the operation was performed on her seven years before the testator's death) to cut off her only remotely possible progeny. It is inconceivable that there could be any circumstance that would involve the patient, the surgeon, or these fourteen separate charities in a conspiracy to participate in an improper operation of such character.[16]

Another distinction between the situation where an illegal operation might be feared and the circumstances here is this: a will speaks only after the testator's death (Testamentary rights and property interests are not created until then), yet at the very

16. We have not discovered the remotest suggestion of an attempt to destroy possibility of issue in any of the cases on this question.

moment in the case at bar when the testator died the impossibility of issue in the life tenant created by the will had already been established. Hence, the motive for an operation to change property rights, so feared by courts where the breach of public policy could occur after the grant or devises upon a contingency, could not possibly exist.

Further, in any case involving estate or inheritance taxes it is difficult to see how such chicanery could be employed against the taxing power. Until the will is given effect by the death of the testator, no interest lies in any life tenant or remainderman. The instant the testator dies the tax attaches, and no subsequent act of the life tenant can in any fashion affect the extent of the gross estate subject to the tax. With this situation understood the fear of a surgical operation in fraud of the rights of the taxing power must be based upon the scheme of a possible life tenant of a possible pre-deceasing testator under the possible terms of a yet ineffective will, to defeat the possible taxing jurisdiction by submitting to a major surgical operation to eliminate her remotely possible progeny. To state the basis for this fear would seem to repel it.

(d) *It Is Occasionally Stated that Evidence of Incapacity Should Be Excluded to Maintain the Title to Property Free from Confusion; No Such Confusion Can Arise Here.*

The excluding rule has sometimes been supported by the argument that admission of evidence on incapacity would tend to uncertainty in the title to property. (*Farrington* v. *Commissioner*, 30 Fed. (2d)

915 (C. C. A. 1st); certiorari denied 279 U. S. 873.) Even the abstract validity of this reasoning is difficult to follow. It is hard to believe that the law, which presumes death after an unexplained absence of seven years (17 Corpus Juris 1167), and directs the administration of the absentee's estate (23 Corpus Juris 1007, 1008), is so incongruous as to fear a confusion of titles where the absence of capacity to give birth to a child is as scientifically capable of proof as here.[17] There is no reliance upon assumption in the present case: the incapacity here is as scientifically demonstrable as is death itself.

It should be clear, therefore, that none of the four reasons given for the rule are applicable to this case. The reason for the rule having no application the rule should have no application.

III

Without the Evidence as to Incapacity the True Value of the Estate for Tax Purposes Cannot Be Computed.

In addition to the reasons why the evidence of incapacity offered in this case is not barred by seeming precedents, because they do not apply here, public policy affirmatively requires the admissibility of this evidence.

This case arises wholly because of the alleged inability of the Commissioner of Internal Revenue to

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17. It is stated in 23 Col. L. Rev., at page 53. that "Under the wise discretion exercised by the English courts * * * not one instance has been found of the birth of a child after possibility of issue has been declared to be extinct." Consequently the recognition of the truth has not produced confusion in titles.

determine the value at the death of the testator of that residue of his estate which was to pass to the charities. If a simple life estate had been the only bar to immediate passage of the residue to the charities, the value of that residue could have been computed at once upon the mortality tables (*Ithaca Trust Company* v. *United States*, 279 U. S. 151; 73 L. ed. 647). The question therefore is to what extent did the provision for "issue" in the testator's will affect the value so determined.

To ascertain the effect of the provision for the issue of the life beneficiary it is necessary first to ascertain the possibility, or impossibility, of issue. Evidence on that score goes not to the question of where the title to the property lies, not to a decision between rival claimants, but wholly to the question of what the value of the ultimate residue to the charities is at the moment of the testator's death.

As stated by the Board of Tax Appeals in the case of *Farrington* v. *Commissioner*, 13 B. T. A. 274, 279, "it would be necessary [in a dispute on valuation] to consider whether the contingency is so remote as to have little or no effect upon the value of the remainder, as in *First National Bank of Birmingham, Exr. Patterson* v. *Snead*, 24 Fed. (2d) 186, or, on the other hand, whether the contingency is such as to make the remainder of only remote speculative value, as in *Humes* v. *United States*, 48 Sup. Ct. 347, 276 U. S. 487."

The wisdom, as a matter of public policy, of admitting evidence concerning the impossibility of issue, is not involved where the question to which the evidence goes is one of valuation by a party (the government) not directly concerned with anything more

than the size of the testator's estate under the statute. It was the province of the court to pass upon the weight of all evidence pertinent to value. Rather clearly the impossibility of issue affects directly the value of the expectancy of the charities, and is evidence affirmatively required for a proper administration of the taxing statutes.

CONCLUSION

It is the purpose of the statute to encourage charitable bequests (*Edwards* v. *Slocum*, 264 U. S. 61; 68 L. ed. 564), and to require no more certainty in the evidence of value than is generally found in "human affairs" (*Ithaca Trust Company* v. *United States*, 279 U. S. 151; 73 L. ed. 647). The evidence in the case at bar establishes beyond the realm of doubt that the birth of a child to the testator's daughter, the only event which could defeat the charitable bequests, was impossible.

The petitioner would deny the Court a knowledge of the facts through reliance upon an archaic rule. That rule, developed in generations of ignorance and resorted to as a refuge from uncertainty and mere opinion, is urged to defeat the presentation of a scientifically ascertained fact. No reason ever assigned for the rule has any application to the circumstances

in the case at bar. The rule is derogative of the truth: there is here no cause for its application. The Court below was right and should be affirmed.

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KIXMILLER, BAAR & MORRIS.

APPENDIX A.

Section 403 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1098-1099, provides in part as follows:

> That for the purpose of the tax the value of the net estate shall be determined—
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> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> * * * * *
>
> (3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. * * *

Treasury Regulations 37 provide in part as follows:

> ART. 53. *Public, charitable, and similar bequests.* — Bequests to religious, charitable, scientific, literary, or educational corporations are deductible only if the corporation is organized or operated exclusively for one of the purposes specified (see Art. 54). Similarly, in the case of a trust, the trust must be exclusively for such purposes. It does not prevent deduction, however, that the property placed in trust is also subject to another trust for a

private purpose. Thus, where money or property is placed in trust to pay the income to an individual during life, and then to pay or deliver the same to a charitable corporation, or apply the principal to a charitable purpose, the charitable bequest or devise forms the basis for a deduction. The amount of the deduction, in such case, is the value, at the date of the decedent's death, of the remainder interest in the money or property which is devised or bequeathed to charity. For the manner of determining the value of such remainder interest, see Article 20. Gifts made in the decedent's lifetime are deductible only if made in contemplation of death, or intended to take effect at or after death, and the property is consequently included in the gross estate. Gifts made in satisfaction of a legacy are also deductible. The deduction is not limited in the case of the estates of residents to bequests to domestic corporations or to trustees for use within the United States.

ART. 56. *Conditional bequests.*—Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed. Where, by the terms of the bequest, devise or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed.

SUPREME COURT OF THE UNITED STATES.

No. 224.—October Term, 1933.

The United States, Petitioner,
vs.
Provident Trust Company, as Administrator of the Estate of George Theodore Roberts, Deceased.
} On Writ of Certiorari to the Court of Claims.

[February 5, 1934.]

Mr. Justice Sutherland delivered the opinion of the Court.

The Provident Trust Company is the administrator, with will annexed, of the estate of the deceased, who died in 1921, leaving a will thereafter duly admitted to probate. Subsequent to the filing of the federal estate tax return, the Commissioner of Internal Revenue imposed an additional estate tax, amounting with interest to something over $21,000. The trust company paid the amount, and filed a claim for refund of $18,404.05, on the ground that under the provisions of the will the value of the residuary estate, less the value of the life estate of the daughter of deceased, should have been but was not allowed as a deduction from the gross estate. The commissioner rejected the claim and this action was brought.

The will, after making certain bequests, devised the remainder of the estate to the trust company, in trust to pay the income thereof to deceased's daughter during her natural life, and upon her death to her lawful issue; and further provided that upon the death of the daughter without issue, the testator's residuary estate should be distributed among designated charitable institutions and societies—all belonging to that class of organizations, bequests to which are deductible from the gross estate under the provisions of § 403 (a) (3) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1098. At the time of deceased's death, the daughter was fifty years of age. She had been in poor health and under a physician's care; and on February 9, 1914, upon medical advice, an operation was performed removing her uterus, Fallopian tubes, and both ovaries.

The court below specifically found—"The operation and removal of the organs were necessary to prevent further impairment of her health. After the operation she could not have become pregnant nor could she have given birth to a child. She died on March 12, 1927, unmarried, and without ever having given birth to a child." Following her death, a state orphans' court awarded the residue of the estate, subject to payment of transfer or inheritance taxes which might be due, to the charitable organizations named in the will.

Upon the foregoing facts, the court below held that respondent was entitled to recover, and accordingly awarded judgment in the sum of $17,204.66. — Ct. Cls. —; 2 F. Supp. 472.

Section 403 (a) (3), *supra*, so far as it is pertinent here, provides that for the purpose of determining the value of the net estate to be taxed there shall be deducted from the value of the gross estate—"(3) The amount of all bequests, . . . to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, ..." Article 53, Treasury Regulations 37, declares that the amount of the deduction in such case is the value at the date of decedent's death of the remainder interest in the money or property which is devised or bequeathed to charity. Compare *Ithaca Trust Co.* v. *United States*, 279 U. S. 151. It follows that in making a deduction for that interest, the value thereof must be determined from data available at the time of the death of decedent. Compare *Humes* v. *United States*, 276 U. S. 487, 494.

The government contended in the court below, as it contends here, that, in view of the restriction in respect of issue contained in the will, the value could not be thus determined, since the law, without regard to the fact, conclusively presumes that a woman is capable of bearing children as long as she lives; and that this presumption controls where the organs of reproduction have been completely removed and inability to bear children admits of no valid dispute, no less than where the question turns upon the circumstance of age alone, or upon conflicting evidence or medical opinions. The lower court held otherwise for the reason that the facts established, as of the date of decedent's death, forbade any other conclusion than that the daughter was incapable of bearing children, and a presumption to the contrary could not be indulged.

The rule in respect of irrebuttable presumptions rests upon grounds of expediency or policy so compelling in character as to override the generally fundamental requirement of our system of law that questions of fact must be resolved according to the proof. Mr. Best, writing more than ninety years ago when the force of the rule was more strictly regarded than it has come to be since, said that modern courts of justice (that is to say, the courts of that day) were slow to recognize presumptions as irrebuttable, and were disposed to restrict rather than extend the number.

"Many presumptions," he says, "which, in earlier times, were deemed absolute and irrebuttable, have, by the opinion of later judges, acting on more enlarged experience, either been ranged among praesumptiones juris tantùm, or considered as presumptions of fact, to be made at the discretion of a jury. . . . By an arbitrary rule, to preclude a party from adducing evidence which, if received, would compel a decision in his favour, is an act which can only be justified by the clearest expediency and soundest policy; and it must be confessed that there are several presumptions still retained in this class which never ought to have found their way into it, and which, it is to be feared, often operate seriously to the defeat of justice." Best, Presumptions of Law and Fact (London, 1844), § 18.

Certainly the world has gained in experience since that was written; and the binding effect, in respect of particular situations, of the ancient rule precluding proof of facts to the end of avoiding supposed injurious results thought to be of greater consequence than the predominance of truth over error, still remains a proper subject of judicial inquiry to be made and resolved in the light of such further experience and knowledge. Compare *Funk* v. *United States,* 290 U. S. , decided December 11, 1933.

The foregoing observations are peculiarly apposite to the phase of the subject now under review; for, as suggested by counsel for respondent, the presumption here involved had its origin at a time when medical knowledge was meager, and many centuries before the discovery of anaesthetics and, consequently, before surgical operations of the kind here involved became practicable. It was not until a comparatively recent period, therefore, that the effect of such an operation was disclosed to observation, and the incontrovertible fact recognized that a woman subjected thereto was permanently incapable of bearing children.

The government argues that the rule is one of substantive law and evidence to overcome it is inadmissible. Whether in particular instances so-called irrebuttable presumptions are, in a more accurate sense, rules of substantive law rather than true presumptions, is a matter in respect of which a good deal has been said by modern commentators on the law of evidence. 2 Chamberlayne on Evidence, §§ 1086, 1087, 1159, *et seq.*; 5 Wigmore on Evidence, 2d Ed., § 2492. Compare *Heiner* v. *Donnan*, 285 U. S. 312, 328-329; 2 Thayer, Evidence, 351-352, 540-541, 545-546. But it is unnecessary to consider that interesting distinction, since, as will appear, the presumption in question in this instance must be dealt with as open to rebuttal and, therefore, in any aspect of the matter, as a true presumption.

The presumption generally has been held to be conclusive when the element of age alone is involved, albeit Lord Coke's view that the law seeth no impossibility of issue, even though both husband and wife be an hundred years old (Coke on Littleton, 551; 2 Blackstone Commentaries 125), if now asserted for the first time, might well be put aside as a rhetorical extravagance. But the presumption, even where age alone is involved, has not been universally upheld as conclusive or applied under all circumstances. It has been followed to a greater extent in this country than in England, though even here exceptional cases are to be found;[1] and in England such cases are very numerous.[2] It does not seem necessary to review the decisions in either jurisdiction. It is enough to say that the English courts have treated the rule as possessing a considerable degree of flexibility and have refused to give it a conclusive effect in a large number of cases; while the American courts, adhering to a more rigid view, have applied the rule more generally. See extended note, 67 A. L. R. 538, *et seq.*, where the decisions are classified and digested. Few cases have arisen where

[1] Male v. Williams, 48 N. J. Eq. 33, 36; Ansonia National Bank v. Kunkel, 105 Conn. 744, 753; Moore's Ex'or v. Beauchamp, 5 Dana (Ky.) 70, 72; Bacot's Case, MS. (N. J.), cited in note to Apgar's Case, 37 N. J. Eq. 502; Apgar v. Apgar, 38 N. J. Eq. 549, 552; Carney v. Kain, 40 W. Va. 758, 811. And in Denver, &c., Railway v. Harris, 122 U. S. 597, 608, a personal injury case, this court sustained without question the admission of evidence that the injured person had been rendered impotent as a result of the physical injury.

[2] See note to Apgar's Case, *supra*, note 1.

elements other than, or in addition to, that of age were present, and the conclusive character of the rule in such cases is by no means established. Thus in *Hill* v. *Spencer*, 196 Ill. 65, 70, the Supreme Court of Illinois, held meaningless an allegation that a woman was past the age of child bearing, but was careful to add, "unless more than a mere matter of age is stated in the bill." See *Denver, &c., Railway* v. *Harris*, *supra*, note 1. And speaking generally this court has said, *Lincoln* v. *French*, 105 U. S. 614, 616-617 "But all presumptions as to matters of fact, capable of ocular or tangible proof, such as the execution of a deed, are in their nature disputable. No conclusive character attaches to them. They may always be rebutted and overthrown."

The basis for the interposition of an irrebuttable presumption is embodied in the general statement of Mr. Wigmore, quoted by the court below, that evidence of certain kinds of facts is excluded "because its admission would injure some other cause more than it would help the cause of truth, and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth." 1 Wigmore on Evidence, 2d Ed., § 11. Relating this obviously correct view to the presumption here invoked, not only do we perceive no grounds of expediency or policy that call for its hard and fast application to a particular physical condition, when ignorance has been supplanted by knowledge so as to put beyond the range of doubt the destructive effect of that condition upon the capacity for child bearing, but we conclude affirmatively that the policy of the statute under review as applied to the case in hand is quite to the contrary.

The important point to be emphasized is that the question arises with respect to a surgical operation, the inevitably destructive effect of which upon the power of procreation is established by tangible and irrefutable proof. Moreover, the case does not involve the rule against perpetuities, the devolution of property, the rights or title of living persons in or to property, or any other situation such as constituted the background of practically all the decisions which have sustained the conclusiveness of the presumption. We have for consideration simply a statutory provision exempting from a prescribed tax the value of all bequests, etc., made to or for the use of charitable organizations and those which are akin, plainly evincing a legislative policy to encourage such be-

quests. *Edwards* v. *Slocum*, 264 U. S. 61, [illegible] And, in that view, we well may assume that Congress could not have meant to leave its aim to be diverted by a purely arbitrary presumption, which, whether applicable or not to *sustain* another or different policy, would deny the truth and *subvert* the policy of this particular legislation. Compare *Humes* v. *United States, supra,* at p. 494.

The sole question to be considered is—What is the value of the interest to be saved from the tax? That is a practical question, not concluded by the presumption invoked but to be determined by ascertaining in terms of money what the property constituting that interest would bring in the market, subject to such uncertainty as ordinarily attaches to such an inquiry. See *Ithaca Trust Co.* v. *United States, supra.* Thus stated, the birth of a child to the daughter of the deceased after his death was so plainly impossible that, as a practical matter, the hazard disappears from the problem. Certainly, in the light of our present accurate knowledge in respect of the subject, if the interest had been offered for sale in the open market during the daughter's lifetime, a suggestion of the possibility of such an event would have been ignored by every intelligent bidder as utterly destitute of reason.

The judgment of the court below is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.